Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL, PETITIONERS

v.

LIBERTY MUTUAL INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ARTHUR M. MURRAY
Counsel of Record

The Murray Firm
909 Poydras Street,
Suite 2550
New Orleans, LA 70112
(504) 525-8100

Attorneys for Petitioners

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

I. Whether *Horton v. Liberty Mutual Ins. Co*, 367 U.S. 348, 81 S.Ct. 1570 (1961) can be used to thwart 28 USC 1445(c) and permit an action disguised as a "declaratory action" that does nothing more than assert affirmative defenses to pending workers' compensation actions, to permit removal and effectively defeat them.

II. Whether the Courts below were required to abstain from a declaratory action that effectively removed pending state workers' compensation actions in light of federalism concerns embodied in the Anti-Injunction Act and Fifth Circuit standards enunciated in *Texas Employers' Insurance Association v. Jackson*, 862 F.2d 491 (5th Cir. 1988)

III. Whether the All Writs Act and re-litigation exception to the Anti-Injunction Act, and this Court's opinion in *Taylor v. Sturgell*, 128 S.Ct. 2161 (2008) permitted the Courts below to deprive Petitioners of their constitutional right to a hearing, and enjoin pending state workers' compensation actions against unnamed, unidentified parties and other actions beyond the scope of the controversy at issue.

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OPINIONS BELOW

The unpublished opinion for the United States Court of Appeals for the Fifth Circuit is reported at 2008 WL 4996608 (5th Cir. 11/25/08). The unpublished opinion of the United States District Court for the Western District of Louisiana is reported at 2007 WL 429182 (W.D. La. 11/30/07). That judgment was amended on January 4, 2008.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit, affirming the decision of the district court's order granting injunctive relief in favor of First Health and First Health's payors, was handed down on November 25, 2008. A timely Petition for Rehearing was denied on January 12, 2009. This Court has jurisdiction pursuant to 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 USC 1445(c)

> A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

28 USC 2283: The Anti-Injunction Act

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of

Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 USC 1651(a): The All Writs Act

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

U.S.C.A. Const. Amendment XIV Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Louisiana Constitution, Art. V §16

(A) Original Jurisdiction. (1) Except as otherwise authorized by this constitution or except as

heretofore or hereafter provided by law for administrative agency determinations in worker's compensation matters, a district court shall have original jurisdiction of all civil and criminal matters. (2) It shall have exclusive original jurisdiction of felony cases and of cases involving title to immovable property, except as provided in (3) below; the right to office or other public position; civil or political right; probate and succession matters; except for administrative agency determination provided for in (1) above, the state, a political corporation, or political subdivisions, or a succession, as a defendant; and the appointment of receivers or liquidators for corporations or partnerships. (3) The legislature may provide by law that a family court has jurisdiction of cases involving title to movable and immovable property when those cases relate to the partition of community property and the settlement of claims arising from matrimonial regimes when such action arises as a result of divorce or annulment of marriage.

La. R.S. 23:1310.3(E)

Except as otherwise provided by R.S. 23:1101(B), 1361, and 1378(E), the workers' compensation judge shall be vested with original, exclusive jurisdiction over all claims or disputes arising out of this Chapter, including but not limited to workers' compensation insurance coverage disputes, group self-insurance indemnity contract disputes, employer demands for recovery for overpayment of benefits, the

determination and recognition of employer credits as provided for in this Chapter, and cross-claims between employers or workers' compensation insurers or self-insurance group funds for indemnification or contribution, concursus proceedings pursuant to Louisiana Code of Civil Procedure Articles 4651 et seq. concerning entitlement to workers' compensation benefits, payment for medical treatment, or attorney fees arising out of an injury subject to this Chapter.

La. R.S. 13:4231

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

(2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent

action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

STATEMENT

A WHO CALLS TO *HORTON*

On the thirtieth of November, in the Western District Court
With livelihoods on the line, this was not just for sport
The judge on the bench, not hearing one voice
Decided the Doctors' fate, giving them no other choice.

What the Court did, which was a grievous sin
Was allowed a removal that was clearly forbidden
Thousands of comp cases, under the laws of the state
Had been brought to the feds, and it was a mistake.

The Doctors went to the Fifth, hoping for relief,
But quickly realized this would have to go to the Chief.
The problem you see, is a misapplication of law,
That will hurt all comp claimants, those big and small

In making this error that led to this Writ
The judge used a case from the bench where You sit,
He said *Horton* allowed it although we were not heard,
Our only prayer now is that You will reverse.

Much like the fabled Dr. Seuss character, in the instant case, *Horton* should not only a hear a "who", but also a "when" and a "where" regarding the applicability of this Courts' 5-4 decision in *Horton v. Liberty Mutual Ins. Co*, 367 U.S. 348, 81 S.Ct. 1570 (1961). Specifically, this Petition should be granted to reverse the lower

courts' extension of *Horton* to allow workers' compensation insurers to effectively remove pending Louisiana workers' compensation actions by filing their affirmative defenses in federal "declaratory actions." In doing so, the Courts below have clearly defeated the congressional intent of 28 USC 1445(c), and have transformed the Declaratory Judgment Act into a tool for federal courts to usurp pending workers' compensation actions from state courts. The lower courts' decisions open the floodgates and workers' compensation insurers everywhere may soon be allowed to litigate state workers' compensation actions in a federal forum at their discretion.

Not only did the Courts below allow the effective removal of pending state workers' compensation cases, but they went on to enjoin Petitioners from pursuing pending state workers' compensation actions against parties not involved in – much less identified in – this litigation. In fact, no claims have been asserted by or on behalf of these unidentified entities, and these "payors" were not mentioned by any party in this litigation until the Western District Court *sua sponte* included these "payors" in its preliminary injunction, which was later made permanent. Effectively therefore, Petitioners have been stripped of their fundamental right to a hearing under the 14th Amendment of the U.S. Constitution.

Petitioners herein, Dr. Clark Gunderson and Lake Charles Memorial Hospital, are healthcare providers who, prior to the instant action, had brought hundreds of claims against Liberty Mutual and other workers' compensation insurers and employers in Louisiana state workers' compensation court ("OWC")

alleging underpayment and late payment of their medical services rendered to occupationally ill or injured workers. The OWC is a state created judicial body constitutionally relegated with the exclusive, original jurisdiction over controversies arising under the Louisiana Workers' Compensation Act (La. R.S. 23:1021 et. seq) ("LWCA").[1] If there was any question as to the OWC's jurisdiction over the fee-payment dispute between Petitioners and Liberty Mutual, that issue was finally put to rest in a recent 7-0 opinion by the Louisiana Supreme Court in *Broussard Physical Therapy v. Family Dollar Stores Inc.*[2], followed by the Louisiana 1st Circuit Court of Appeal.[3]

Specifically, Petitioners' Louisiana workers' compensation actions against Liberty Mutual and other workers' compensation insurers involve the workers' compensation insurers' obligations to pay healthcare providers for medical services under the LWCA. The claims, defenses, and counterarguments can be summarized as follows:

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[1] See. La. Const. Art. V, §16; La. R.S. 23:1310.3

[2] *Broussard Physical Therapy v. Family Dollar Stores Inc.*, 2008-cc-1013 (La. 12/02/08), 2008 WL 5146651

[3] *Millervillage Chiropractic Center v. East Baton Rouge Parish School Board*, 2008-1350 (La. App. 1 Cir. 12/23/08), 2008 WL 5351672.

Providers' OWC Claims	**Insurers' Affirmative Defense**	**Defense not valid because:**
• Failure to pay for workers' compensation medical services timely and/or in accordance with the rates established by the LWCA • Penalties and attorneys fees as provided in LWCA	• In lieu of rates established by the LWCA, insurers accessed alleged provider contracts with a Preferred Provider Organization (PPO) network, and applied the PPO network rate	• Insurer/employer (i.e. entity accessing PPO rate) did not give notice as required by PPO Act. • LWCA prohibits insurers from accessing contracts that reduce employers' workers' compensation obligation • Payments were not timely or not made in accordance with terms of PPO contract • Employer/Insurer had no contractual authority to access provider contract.

Instead of litigating the workers' compensation fee-payment dispute in the OWC as required by Louisiana law, Liberty Mutual used the Declaratory

Judgment Act (28 USC 2201) to circumvent 28 USC 1445(c), and assert its PPO related affirmative defenses to the workers' compensation actions in federal court. Without the fee-payment controversy between the Petitioners and Liberty Mutual, the declaratory relief sought by Liberty Mutual would be abstract and hypothetical.

In light of the pending workers' compensation actions, Petitioners moved to dismiss Liberty Mutual's action asserting that the district court lacked jurisdiction and/or was required to abstain. The district court, however, relying on *Horton v. Liberty Mutual Ins. Co*, 367 U.S. 348, 81 S.Ct. 1570 (1961), denied Petitioners' motion and usurped the pending workers' compensation actions from the Louisiana workers' compensation court. The district court went on to grant a final partial summary judgment in favor of Liberty Mutual granting the declaratory relief requested. Petitioners appealed issues concerning the district court's authority to render the summary judgment; however, the Fifth Circuit dismissed Petitioners' appeal without written reasons.

Even though Petitioners were prohibited from raising issues of jurisdiction and/or mandatory abstention to the Fifth Circuit, the district court went on to use the declaratory relief granted in favor of Liberty Mutual to enjoin, *inter alia*, Petitioners' pending OWC actions against not only Liberty Mutual but any First Health "payor" – whatever that may mean – in an effort to "protect and effectuate" its judgment.

First Health, who owns and operates the First Health Preferred Provider Organization ("PPO") network, was brought into this litigation as a defendant when Liberty Mutual amended its Complaint and sought to recover from First Health indemnification for any liability imposed on Liberty Mutual in the pending OWC actions. It is undisputed that Petitioners herein were, and currently are, members of the First Health network, and that Liberty Mutual accessed and applied First Health's network rates[4]. First Health filed its own motion for summary judgment against Liberty Mutual regarding its indemnification obligations, ignoring that there had been no judgment of liability in the OWC against Liberty Mutual, and that under Louisiana law, Liberty Mutual's indemnification claims do not yet exist[5] (i.e. were not ripe for adjudication under Art. III of the U.S. Constitution).

Specifically, First Health asserted it was not required to indemnify Liberty Mutual because First Health is exempt from the statutory notice provisions of the Louisiana PPO Act (La. R.S. 40:2201, et. seq) – in other words, First Health's efforts were an attempt to obtain its own declaratory relief against Petitioners without filing any claims regarding First Health's obligations owed to Petitioners as a result of doing business in Louisiana. Obligations First Health owes to Petitioners under the Louisiana PPO Act have nothing

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[4] Liberty Mutual did not always pay the correct First Health rate and/or timely in accordance with the Providers' First Health contracts; however, the district court ignored this argument.

[5] *Suire v. Lafayette Parish Consolidated Government*, 907 So.2d 37 (La. 2005)

to do with Liberty Mutual's obligations to pay Petitioners in accordance with the LWCA, or with First Health's obligations to indemnify Liberty Mutual, and are therefore irrelevant to this litigation. In the same summary judgment in favor of Liberty Mutual, the district court partially ruled in favor of First Health regarding its indemnification obligations and, went on to enjoin Petitioners from pursuing pending or future state actions "alleging" that their contracts with First Health are "null and void because [Petitioners were] not provided with a benefit card as required by [the Louisiana PPO Act]." Even though the summary judgment in favor of Liberty Mutual involves only Liberty Mutual's obligations under the LWCA, the Court below upheld this injunction as being necessary to "protect or effectuate" the summary judgment in favor of Liberty Mutual.

It was improper for the Courts below to rely on *Horton, supra*, to usurp pending state workers' compensation actions and render declaratory relief in favor of Liberty Mutual. Therefore, the district court did not have authority to render the summary judgment, and it is invalid. Because the summary judgment is invalid, injunctions based upon that judgment are not proper under the All Writs Act and re-litigation exception to the Anti-Injunction Act. Further, the Court Below has denied Petitioners of their 14th Amendment right to a hearing over the state actions enjoined, and has enjoined actions beyond the fee-payment dispute between Petitioners and Liberty Mutual; therefore, the Court Below should be reversed.

REASONS FOR GRANTING THE PETITION

1. *Horton v. Liberty Mutual Ins. Co*, 367 U.S. 348, 81 S.Ct. 1570 (1961) should not allow an insurer to circumvent 28 USC 1445(c) and effectively remove pending workers' compensation actions.

The Court below upheld the injunctions at issue relying on the re-litigation exception to the Anti-Injunction Act (28 USC 2283) and the All Writs Act (28 USC 1651(a)), finding them necessary to "protect or effectuate" the judgment in favor of Liberty Mutual. This strict and narrow exception to the Anti-Injunction Act is founded on concepts of *res judicata*,[6] - i.e. the judgment's "preclusive effect". Under Louisiana law, which is applicable in this case,[7] for a judgment to have preclusive effect, a judgment must, *inter alia*, be "valid," in that it must have been rendered by a court with authority to hear the action.[8] Because *Horton*, supra, should not have been extended to give a federal court jurisdiction over pending state workers' compensation actions, the summary judgment does not

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[6] *Deus v. Allstate*, 15 F.3d 506 (5th Cir. 1994)

[7] *Semteck Intern Inc. v. Lockheed Martin*, 531 U.S. 497, 121 S.Ct. 1021 (02/27/01): When a Federal Court sitting in diversity renders judgment by application of state law, the judgment has the same preclusive effect that would be applied by the state in which the federal diversity sits. (i.e. Louisiana in this case).

[8] La. R.S. 13:4231 comment (d) provides "Valid and Final. To have any preclusive effect a judgment must be valid, that is it must have been rendered by a court with jurisdiction over the subject matter and over parties...."

have preclusive effect over the state actions enjoined, and the injunctions are improper.

Liberty Mutual effectively removed the Louisiana workers' compensation actions pending against it by asserting its affirmative defenses in the form of a federal declaratory action. In sum, Liberty Mutual sought declaratory relief that it paid Petitioners in accordance with the LWCA because it accessed Petitioners' provider agreements with First Health and paid First Health's PPO network rates in lieu of the rates established by the LWCA. With respect to Liberty Mutual, issues involving the propriety of access to the First Health provider agreements arise only as a defense to the pending OWC actions and should not characterize the nature of the controversy[9]. Without the fee-payment dispute, the declaratory relief sought by Liberty Mutual would be abstract and hypothetical, depriving a federal court of authority to render declaratory relief under the Declaratory Judgment Act[10]. Further, a unanimous Louisiana Supreme Court and the Louisiana 1st Circuit Court of Appeal recently recognized that the PPO defense does not alter the OWC's jurisdiction over the fee payment dispute, which

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[9] See *Public Service Commission v. Wycoff Co.*, 344 US 237, 73 S.Ct. 236 (1953): The character of the declaratory defendants' threatened action, not the defenses thereto, determines a court's authority to hear a declaratory action.

[10] *Skelly Oil v. Phillips Petroleum*, 339 U.S. 667, 70 S.Ct. 876 (U.S. 1950).

undeniably arises under the LWCA.[11] Therefore, the Court below was *Erie*-bound to recognize the same.

Instead, the Court below relied on *Horton v. Liberty Mutual Ins. Co*, 367 U.S. 348, 81 S.Ct. 1570 (1961) in finding that the district court had authority to hear the declaratory action even though the declaratory action effectively removed pending state workers' compensation actions. The 5-4 decision in *Horton*, however is distinguishable in that it recognizes in passing only whether an original cause of action for *de novo* judicial review of a Texas workers' compensation board's award is within a district court's original jurisdiction. Even the Fifth Circuit in *Horton*, recognized that "as conditions precedent to the filing of the suit....[a] claim must have been filed with the board, and the board must have a final ruling and decision.[12]" Unlike Louisiana law which has constitutionally relegated the OWC with the original, exclusive jurisdiction over cases arising under the LWCA, Texas law had created an administrative board whose decisions were not binding and always subject to review by a "court." At the time of *Horton*, Texas law allowed either party to bring an original action in a court of first instance to set aside an award granted by the board.[13] Liberty Mutual's instant action, however,

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[11] *Broussard Physical Therapy v. Family Dollar Stores Inc.*, 2008-cc-1013 (La. 12/02/08), 2008 WL 5146651; *Millervillage Chiropractic Center v. East Baton Rouge Parish School Board*, 2008-1350 (La. App. 1 Cir. 12/23/08), 2008 WL 5351672.

[12] Liberty Mut. Ins. Co. v. Horton, 275 F.2d 148, 160 (5th Cir.1960)

[13] Vernon's Tx. Ann. Civ. Stat. Art. 8307, s 5 (1960); Horton, supra; Liberty Mut. Ins. Co. v. Horton, 275 F.2d 148 (5th Cir.1960)

is neither an original action, nor an action to set aside a ruling from the OWC. Instead, it is an effective removal of pending Louisiana workers' compensation actions.

In fact, Chief Justice Warren, and Justices Clark, Brennan, and Stewart reflected on the policies underlying 28 USC 1445(c) and dissented in *Horton* stating that

> "..[t]oday's decision effectively emasculates the recent congressional attempt to limit diversity jurisdiction, especially in workers' compensation cases. In order to decrease the "workload of the Federal Court's," which "has greatly increased because of the removal of workmen's compensation cases from the State courts to Federal Courts," the Judicial Conference of the United States urged the passage of .....[28 USC 1445(c)].... Workmen's compensation cases were singled out and specifically dealt with because they "arise and exist only by virtue of State laws. No federal question is involved and no law of the United States is involved in these cases (citations omitted)." (emphasis added)
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> ".....[A] clearer expression of the congressional dislike for saddling federal courts with such cases could hardly be imagined. We should therefore give effect to this policy wherever possible. Not only does the decision of today fail to do this, but the Court goes out of its way to defeat the congressional intent. The statement

> that "the workman has the option to file his case in either the Federal or State courts (citations omitted) is no longer correct. It is now an unequal race to the courthouse door- a race that the insurers will invariably win.....Thus the Court – contrary to the specifically expressed intention of the Congress – grants the insurance company with the option of going into federal court, with all its attendant difficulties to the already over-burdened federal judiciary and impecunious workman." (emphasis added)

Expanding *Horton* to allow a federal court to usurp pending state workers' compensation actions by way of a declaratory judgment sets precedent for allowing any workers' compensation insurer to do the same. Such precedent will have the opposite effect of the polices underlying 28 USC 1445(C), will increase a federal court's workload of workers' compensation actions, and force workers' compensation claimants to litigate their claims in federal court even if they originally choose to file a state court action. In fact, in this very action, Liberty Mutual has successfully amended its complaint to add two additional Plaintiffs and eight new defendants thereby effectively removing over 200 additional pending workers' compensation actions involving over 1,000 individual payments to the providers.

Even the Fifth Circuit has recognized on several previous occasions that it lacks jurisdiction over pending workers' compensation actions or workers' compensation actions where the parties have not exhausted their administrative remedies; yet the Court below failed to recognize these cases. In *Dial v.*

Hartford Accident and Indemnity Company, 863 F.2d. 15 (5th Cir. 1989), an injured worker filed two separate actions against an insurer – one in state workers' compensation court, and one in federal court. In dismissing the federal action for lack of jurisdiction, the court recognized that the case was governed by Mississippi law, which required the claimant to exhaust all administrative remedies prior to filing an action in federal court. The Fifth Circuit recognized that the Mississippi legislature had placed the issue before an administrative body with special expertise in the field. Similarly, in *Hedrick ex. rel. Adams v. Texas Workers' Compensation Commission*, 54 Fed. Appx. 592 (5th Cir. 2002), 2002 WL 31730360, which like *Horton* involved Texas Workers' Compensation law, the Fifth circuit dismissed the Plaintiffs' action because, unlike in *Horton*, the Plaintiff had not exhausted its administrative remedies and utilized the administrative board prior to bringing the federal action..

Additionally, like the dissent in *Horton*, the Fifth Circuit has recognized that 28 USC 1445(c) reflects a strong congressional policy that where a state workers' compensation court has been utilized by one of the parties, the case should remain in the state court for its ultimate disposition. *Kay v. Home Indemnity Co*, 337 F.2d 898 (5th Cir. 1964). **Workers' compensation claims are "the most local of local causes,"** that should be "held in the state forum in which...the ultimate authoritative determination can alone be made." *Id.* at 902. This recognition is clearly in line with the 10th Amendment to the U.S. Constitution which states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Louisiana Constitution has specifically created a special workers' compensation court with the power and authority to adjudicate disputes arising under the LWCA – including the instant fee-payment dispute – and 28 USC 1445(c) specifically divests federal courts of authority to hear removed state workers' compensation actions. Therefore, *Horton*, should not be utilized to circumvent the 28 USC 1445(c) or the 10th Amendment.

Similarly, in *Ryder Services Corp. v. Savage*, 945 F.Supp.232 (N.D. Ala. 1996), an employer brought a federal declaratory action against an injured worker prior to being sued in state court. In questioning the "highly creative thinking by the Plaintiffs," as well as the lack of precedent involving similar declaratory actions, the district court dismissed the employers' action because Alabama courts had exclusive jurisdiction over issues pertaining to workers' compensation liability. The court reasoned that even if the workers' compensation claimant filed a suit in state court after the federal action had been filed, the state court would owe no deference to the federal court. Instead, the federal court should defer to, and not interfere with, state court proceedings.

Even the Western District, in the case of *Sentry Insurance Company v. Southwest Louisiana Hospital, et. al*, had a change of heart following the instant case

and recognized the impropriety of relying on *Horton* to keep Sentry's declaratory action involving the same fee-payment dispute pending in Louisiana workers' compensation court[14]. Similarly, the same Western District reached a similar result in another workers' compensation fee-payment dispute, but later went on to reverse itself on rehearing[15]. Clearly, therefore, guidance is needed on this issue – otherwise, the same pattern of events will allow workers' compensation insurers to remove the 1000's of similar fee payment disputes pending in Louisiana's workers' compensation courts, and allow the federal district court to interfere with Louisiana's developing law on exclusively state workers' compensation issues raised herein.

It is clear that *Horton*, *Dial*, *Hedrick*, *Kay*, and *Ryder* all recognize that when a federal court sits in diversity, it must give deference to state workers' compensation law. As stated herein, the Louisiana OWC is a judicial body with the exclusive, original jurisdiction over the fee-payment dispute between Liberty Mutual and Petitioners. Because the fee-payment dispute was pending prior to the initiation of Liberty Mutual's declaratory action, as recognized by Liberty Mutual in its own complaint, *Horton*, should not be extended to allow the effective removal of those actions. Because the district court lacked authority to render the summary judgment in favor of Liberty

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[14] 06 570 (W.D. La. 6/4/08) – this case is not available on Westlaw but is included in the Appendix

[15] *Isle of Capri Casinos, Inc. v. COL Management*, 2008 WL 4792686 (W.D. La. 11/3/08), *vacated on reconsideration by*, 2009 WL 259667 (W.D. La. 2/3/09).

Mutual, the injunctions meant to "protect or effectuate" that judgment are invalid and should be overturned.

2) Pending state workers' compensation actions required abstention from Liberty Mutual's declaratory action.

In addition to recognizing the improper expansion of *Horton*, the Court below should have recognized that, because of the pending workers' compensation actions, the district court lacked authority to render the summary judgment under policies of federalism embodied in the Anti-Injunction Act, as recognized by the Fifth Circuit in *Texas Employers' Insurance Association v. Jackson*, 862 F.2d 491, 505 (5th Cir. 1988). Diversity jurisdiction, alone, does not determine whether a declaratory action can be decided[16], and therefore, the Court below should have considered whether the district court's judgment was invalid for failure to abstain,[17] as mandated by Fifth Circuit standards. Because abstention was mandatory, the underlying summary judgment was invalid, and the injunctive relief based thereon is likewise invalid.

In *Texas Employers' Insurance Association v. Jackson*, 862 F.2d 491, 505 (5th Cir. 1988), otherwise known as "*Jackson II*", the Fifth Circuit recognized that

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[16] *Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S.Ct. 2137 (U.S. 1995).

[17] *Orix Credit Alliance v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000)

> "One of the main purposes of the Federal Declaratory Judgment Act...was to provide a means to grant litigants judicial relief from legal uncertainty in situations that had not developed sufficiently to authorize traditional coercive relief. Litigants would no longer be put to the Hobson's choice of foregoing their rights or acting at their peril, nor, if they had already acted, would they be forced to wait, for perhaps many years, until the statute of limitations expired, to know whether they had been subjected to some significant liability. *See e.g. Perez v. Ledesma*, 401 U.S. 82 (1971)(opinion of Justice Brennan, joined by Justices White and Marshall concurring in part, dissenting in part).....[W]ith the enactment of the statute the courts would no longer have to tell the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it."

However, when a state proceeding has already been filed against the declaratory Plaintiff, "there [is] no putative mushroom that [the declaratory plaintiff] wishe[s] to eat", nor is the declaratory Plaintiff in the position of not knowing when its potential liability will ever be judicially determined. *Id.* When the declaratory action involves nothing more than the declaratory-defendant's state suit, then the only purpose and effect of the declaratory action is to defeat the state court action. *Id.* Under such circumstances, the Fifth Circuit has recognized that it has no authority to hear the declaratory action. *Id.*

> "To allow declaratory relief in these circumstances would be to transform section 2283 from a pillar of federalism reflecting the fundamental constitutional independence of the states and their courts, to an anachronistic, minor technicality, easily avoided by mere nomenclature or procedural sleight of hand. A federal declaratory judgment will, or course, be *res judicata* of the state suit, thus resolving it as surely as an injunction, and in any event the declaratory judgment can itself be enforced by injunction under 28 USC 2202 pursuant to the "protect or effectuate" exception to 2283." *Id.*

Accordingly, the Fifth Circuit held in *Jackson II* that, "if an injunction would be barred by [the Anti-injunction Act], the district court is also barred from issuing a declaratory judgment that would have the same effect as an injunction. *Id.* 506. *Jackson II* was reaffirmed in *Travelers Insurance Company v. Louisiana Farm Bureau Federation Inc.*, 996 F.2d. 774 (5th Cir. 1993) and *Sherwin Williams v. Holmes County* 343 F.3d 383 (5th Cir. 2003). The Louisiana OWC is a judicial body with the exclusive, original jurisdiction to declare and enforce liabilities under the LWCA[18] – including the fee-payment dispute at issue – therefore the Anti-Injunction Act would have prevented the district court from enjoining the pending state workers compensation actions against Liberty Mutual at the time Liberty Mutual initiated this

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[18] Article V, section 19 of the Louisiana Constitution and La. R.S.23:1310.3

litigation, the declaratory action should not have been granted under *Jackson II*[19].

Further, the Court below failed to consider whether the district court should have exercised its broad discretion under the Declaratory Judgment Act (28 USC 2201) and abstained from Liberty Mutual's declaratory action. In light of *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 62 S.Ct. 1173 (1942), the Fifth Circuit requires courts to consider issues concerning the proper allocation of decision making between state and federal courts, fairness, and efficiency when evaluating whether to abstain from a declaratory action. The Fifth Circuit has developed specific factors that must be considered. *Sherwin-Williams Co. v. Holmes County*, 343 F.3d. 383 (5th Cir. 2003).

Specifically, a court must consider (1) whether there is a pending state action in which the controversy at issue may be fully litigated, (2) whether the plaintiff filed suit in anticipation of the lawsuit filed by defendant, (3) whether plaintiff engaged in forum shopping in brining suit, (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist, (5) whether federal is a convenient forum for parties and witnesses, and (6) whether retaining the lawsuit in federal court would serve purposes of judicial economy. ("*Trejo* factors").

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[19] See *Roudebush v. Harike, Roudebush v. Hartke* 405 U.S. 15, 92 S.Ct. 804 (1972), and *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67 (1908): the Anti-Injunction Act applies to state judicial bodies that perform "judicial functions" and/or make "judicial inquiries."

St. Paul Ins. v. Trejo, 39 F.3d 585, 590-591 (5th Cir. 1994).

The first factor weighs in favor of abstention because the only controversy between Liberty Mutual and Petitioners (i.e. the fee payment dispute) was previously pending in the OWC. Abstention under this factor is not only proper, but mandatory as explained above.

The second, third and fourth, *Trejo* factors also weigh in favor of abstention. The Fifth Circuit has recognized that a Court should abstain when a declaratory action was filed for improper and/or abusive purposes. *Sherwin-Williams Co. v. Holmes County*, 343 F.3d. 383 (5th Cir. 2003). Liberty Mutual's action seeks no purpose other than to circumvent 28 USC 1445(c), undermine the pending OWC actions and interfere with the developing law on the issues presented.

Factors five and six focus on efficiency concerns. *Sherwin-Williams*, supra. Specifically, the court should avoid duplicative or piecemeal litigation if possible. *Id.* Further, these factors raise federalism and comity concerns because of the potential of inconsistent state and federal court proceedings in cases involving state issues. The Louisiana OWC has been constitutionally granted with authority to adjudicate the fee payment dispute at issue, and there are thousands of similar cases pending in the OWC. Therefore, the potential of inconsistent state and federal court proceedings should have lead to abstention given that issues raised herein were properly moving their way through Louisiana's judicial system. It was improper for the Courts below

to interfere with Louisiana's developing law pertaining to the LWCA.

Further, the fact that Liberty Mutual has, in addition to its claims for declaratory relief, also asserted breach of contract claims – which have been pending for over four years – should not affect the abstention analysis or the district court's lack of authority to hear the declaratory action. The contract claims are not supported under any theory of law and were clearly brought to undermine this Court's authority to abstain from the declaratory action. Liberty Mutual asserts that Petitioners breached their contracts with First Health by filing actions against Liberty Mutual in the OWC, and that Liberty Mutual is therefore entitled to damages. The only "damages" that Liberty Mutual could incur would be a judgment of liability against it from the OWC, making the breach of contract claims illogical. Further, Petitioners contracts with First Health do not allow for the recovery of attorney's fees in the event of a breach, so Liberty Mutual's "breach of contract" theory further fails.

Because abstention should have been mandatory given the pending state worker' compensation actions, the district court lacked authority to render the summary judgment in favor of Liberty Mutual. Therefore, the injunction that supposedly "protects or effectuates" that judgment is likewise improper.

3. Petitioners were denied due process rights to a hearing when they were enjoined from pending workers' compensation actions against unnamed, unidentified entities not involved in this litigation.

It is a principle of general application in Anglo-American jurisdiction that one cannot be bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Taylor v. Sturgell*, 128 S.Ct. 2161(2008), citing *Hansberry v. Lee*, U.S. 311 US 32, 61 S.Ct. 115 (1940). Yet, Gunderson and LCMH have been enjoined from pursuing hundreds of pending workers' compensation actions against "First Health's payors," who are not involved in, or otherwise named in, this litigation, without the right to a hearing. Arguably, First Health's "payors" could include any employer, insurance company, or TPA who has accessed, applied, and/or benefited from a First Health discount being applied to a bill for workers' compensation services, yet not one of the thousands of payments made to Petitioners involving First Health PPO discounting was evaluated for accuracy, much less submitted, in this litigation. Instead, the district court, in granting preliminary injunctive relief in favor of First Health, *sua sponte* included "First Health's payors" in the preliminary injunction, and then went on to render a permanent injunction in favor of First Health's payors under an expanded theory of "privity."

The Courts Below found that the First Health payors, although unnamed, unidentified, and in no way involved in this litigation, were somehow "in privity" with Liberty Mutual sufficient to make them bound by the judgment in favor of Liberty Mutual. This

expansion of the concept of privity is equivalent to a "virtual representation" theory clearly prohibited by this Court's recent decision in *Taylor v. Sturgell*, 128 S.Ct. 2161 (2008). There is no evidence that these "payors" fit into one of the six categories enumerated in *Taylor*, sufficient to allow these non-party "payors" to be bound by a judgment in favor of Liberty Mutual[20]. Further, these "payors" necessarily include Louisiana employers and/or insures who would have precluded diversity jurisdiction had they been named as parties.

Liberty Mutual never asserted that it was filing this action on behalf of anyone else other than itself, there is no reference to any "payor" in the judgment in favor of Liberty Mutual, and neither Petitioners nor these "payors" had any notice that these "payors" would be included in the judgment in favor of Liberty Mutual. Effectively, however, the Courts below removed and enjoined not only the fee-dispute between Petitioners and Liberty Mutual, but any similar fee-payment dispute between Petitioners and "First Health's payors" – whatever that may mean – regardless of whether those "payors" paid timely, in accordance with the terms of the provider agreements, or even had contractual authority to access First Health's network.

Further, Liberty Mutual never asserted that it was filing an action against Petitioners on behalf of

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[20] The Fifth Circuit recognizes only three situations in which a non-party can be in privity with a party for res-judicata purposes: 1) if he is a successor in interest to the party's interest in property; 2) if he controlled the prior litigation; or 3) if the party adequately represented his interests in the prior proceeding." *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990)

First Health, yet the Courts below again expanded the concept of "privity" and recognized First Health as being in privity with Liberty Mutual sufficient to bind First Health to the judgment in favor of Liberty Mutual and against First Health. Not only does First Health not fit into one of the six categories enunciated in *Taylor, supra*, Liberty Mutual sued First Health for indemnity in this action. In fact, First Health filed not one claim against Petitioners or Liberty Mutual in this matter, yet has obtained an injunction in its favor well beyond the scope of the judgment in favor of Liberty Mutual.

As explained above, for an injunction to be proper under limited exception recognized by the All Writs Act and re-litigation exception to the Anti-Injunction Act, the underlying judgment which the injunction "protects or effectuates" must have *res judicata*, or preclusive, effect over the state actions enjoined. In addition to a final, valid judgment by a court of competent jurisdiction and identity of the parties, Louisiana's *res judicata* law (La. R.S. 13:4231), which is applicable here[21], always requires an identity of the cause of action and an identity of the thing demanded. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425 (5th Cir. 2000)[22]. Therefore, the

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[21] *Semtek Intern Inc. v. Lockheed Martin*, 531 U.S. 497, 121 S.Ct. 1021 (02/27/01)

[22] The Courts below relied upon the Fifth Circuit's 4-part test developed before *Semteck* – i.e. 1) a court of competent jurisdiction must have rendered the prior judgment; 2) the parties in both actions must be identical, or at least in privity with each other; 3) there must have been a final judgment on the merits in the previous decision; and 4) the Plaintiff must raise the same cause of

declaratory relief in favor of Liberty Mutual does not have *res judicata* effect as to First Health, or the unidentified "payors" of First Health.

Based upon the judgment rendered in favor of Liberty Mutual, and against Petitioners involving Liberty Mutual's obligations to pay Petitioners under the workers' compensation Act, Petitioners were enjoined from pursuing any state action in any state court alleging that their contracts with First Health are "null and void because [Petitioners were] not provided with a benefit card as required by [the Louisiana PPO Act]." Therefore, the injunctive relief involves actions involving a separate and distinct cause of action, and "thing demanded." Liberty Mutual sought declaratory relief regarding its workers' compensation obligations, yet Petitioners have been enjoined from asserting breach of contract actions against First Health, who, in the context of this litigation, is not a workers' compensation payor (i.e. insurer, TPA) and has no obligations under the workers' compensation Act.

The All Writs Act and re-litigation exception to the Anti-Injunction action are narrow and are not to be enlarged by loose statutory construction. *Chick Kam Choo v. Exxon*, 486 U.S. 140, 108 S.Ct. 1684 (1988). Yet the Courts below have loosely construed the relevant statutes to effectively remove hundreds, if not thousands, of pending workers' compensation actions, and allow entities not involved in this action to benefit from a judgment in favor of only Liberty Mutual.

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action or claim in both suits. *Regions Bank of Louisiana v. Rivet*, 2224 F.2d 483, 488 (5th Cir. 2000). However, it failed to realize that the actions enjoined were not the same as the actions litigated.

Further, the Anti-Injunction Act is a pillar of federalism that is not meant to be avoided by mere nomenclature or procedural sleight of hand.[23] Therefore, enjoining pending state workers' compensation actions, which are the "most local of local causes,"[24] against entities who are not part of this litigation – much less identified – is contrary to well established policies of comity and federalism, and far exceeds the limited power relegated to federal courts to enjoin state workers' compensation actions.

CONCLUSION

The Court below improperly expanded *Horton*, supra, to allow a workers' compensation insurer to remove pending state workers' compensation actions by asserting its affirmative defenses in a declaratory action, and now Petitioners herein respectfully urge this Court to examine the proper scope and application of *Horton*. Further, issues underlying the Anti-Injunction Act, as recognized by the Fifth Circuit, should have mandated abstention over the workers' compensation dispute given that the same dispute was pending in state workers' compensation courts; therefore, the summary judgment in favor of Liberty Mutual is invalid, rendering the injunctions based thereon invalid as well. Further, it was not necessary to deprive Petitioners' their due process right to a hearing, and enjoin pending workers' compensation actions against unidentified entities in order to "protect

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[23] *Texas Employers' Insurance Association v. Jackson*, 862 F.2d 491, (5th Cir. 1988).

[24] *Kay v. Home Indemnity Co*, 337 F.2d 898 (5th Cir. 1964)

or effectuate" the judgment in favor of Liberty Mutual. The Court below exceeded its narrow authority to enjoin state actions well beyond the scope of the instant workers' compensation related controversy, and therefore, Petitioners herein respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED:

ARTHUR M. MURRAY
THE MURRAY FIRM
909 Poydras Street, Suite 2550
New Orleans, LA 70112-4000
Telephone: (504) 525-8100

(any footnotes trail end of each document)
No. 08-30075 Summary Calendar
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee

v.

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL, Defendants-Appellants

November 25, 2008, Filed

Appeal from the United States District Court for the Western District of Louisiana. USDC No. 2:04-CV-2405.

Before STEWART, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM: *

Defendants-Appellants Dr. Clark Gunderson and Lake Charles Memorial Hospital (jointly "Gunderson") appeal the district court's grant of First Health Group Corporation's ("First Health") motion for a permanent injunction and stay of proceedings. Appellee First Health requests that this Court dismiss the instant appeal for lack of jurisdiction. We DENY First Health's motion to dismiss, and AFFIRM the district court's grant of the permanent injunction.

I. FACTUAL AND PROCEDURAL BACKGROUND

The parties in this case have a long and complicated history of litigation. The factual and procedural background relevant to the instant appeal is provided below.

> Liberty Mutual entered into an agreement ("PPO Contract") with [First Health] whereby First Health agreed to make available to Liberty Mutual various hospitals and medical providers. Defendants, Dr. Clark Gunderson ("Gunderson") and Lake Charles Memorial Hospital ("LCMH") entered into "Provider Agreements" with First Health for the delivery of medical services at discounted rates to "Payors," namely in this suit, Liberty Mutual. . . . Gunderson and LCMH asserted in [a prior] suit that the payment provision of their Provider Agreements is null and void under the disclosure rules of Louisiana's Any Willing Provider Act, Louisiana Revised Statute 40:2203.1, because [Liberty Mutual] (the preferred provider organizations and third party administrators) failed to comply with the statute's notice provisions. Thus, Gunderson and LCMH, assert that they are entitled to additional monies [from Liberty Mutual] for medical services performed, in addition to statutory penalties and attorneys' fees.
>
> Liberty Mutual filed this suit requesting that the Court enter a judgment declaring that (1) the Provider Agreements are valid and enforceable, (2) Liberty Mutual is obligated to pay Gunderson and LCMH only the negotiated rates for medical

> services performed, (3) Gunderson and LCMH are not entitled to be paid amounts in excess of the negotiated rates, (3) [*sic*] Gunderson and LCMH have no cause of action under any law, statute, or regulation against Liberty Mutual, and (5) Gunderson and LCMH's efforts to receive additional monies violate their contracts which constitutes a breach of those contracts, entitling Liberty Mutual to damages and indemnity, including, but not limited to attorneys [*sic*] fees.
>
> In its Second Amended Complaint, Liberty Mutual added as a defendant, [*sic*] First Health. . . . Liberty Mutual maintains that pursuant to the PPO Contract, First Health agreed to "fully indemnify and hold harmless [Liberty Mutual] . . . from and against any and all claims . . . .
>
> First Health filed a motion for summary judgment maintaining that because the Provider Agreements are valid and enforceable, First Health is not obligated to indemnify Liberty Mutual. . . . Liberty Mutual filed a motion for partial summary judgment seeking a declaration against Gunderson and LCMH that the Provider Agreements with First Health are valid and enforceable.

Liberty Mutual Ins. Co. v. Gunderson, No. 04-cv-2405, 2006 U.S. Dist. LEXIS 10278 (W.D. La Feb. 15, 2006) (Mem. Ruling). On February 15, 2006, the district court made the following rulings at the summary judgment stage:

> (1) the discount provisions in the Provider Agreements between First Health and Gunderson and LCMH are valid and enforceable because there are no prohibitions in the Louisiana Workers' Compensation law that prevent a provider from agreeing to charge and received discounted rates for the services they provide to occupationally ill or injured workers, and (2) the payment provisions of the provider Agreement between Liberty Mutual and Gunderson and LCMH are not null and void because Louisiana Revised Statute § 40.2203.1 expressly states that the notice requirement provisions shall not apply to group purchasers (First Health) or to agreements of a group purchaser (payors such as Liberty Mutual who have an agreement with First Health).

Liberty Mutual Ins. Co., No. 04-cv-2405, 2007 U.S. Dist. LEXIS 89479, *3 (W.D. La. Nov. 30, 2007) (Memorandum Ruling).

On October 30, 2006, the district court issued a temporary restraining order and preliminary injunction against Gunderson preventing him from pursuing any claim before any court arising under Louisiana's Any Willing Provider Act against First Health or any payor as set forth in the provider agreements between First Health and Gunderson. Gunderson did not file an appeal to the district court's order granting the preliminary injunction.

On August 24, 2007, Liberty Mutual filed a motion for civil contempt and sanctions, for a permanent injunction, and for stay of proceedings pursuant to the

All Writs Act, 28 U.S.C. § 1651(a).[1] Liberty Mutual alleged that Gunderson continued to file and prosecute claims in violation of the October 2006 preliminary injunction.

On September 27, 2007, First Health requested an order holding Gunderson in civil contempt for violating the October 2006 preliminary injunction. First Health also requested that the district court permanently enjoin Gunderson from relitigating in the Louisiana state workers' compensation system factual and legal issues actually decided by the district court's February 2006 memorandum ruling and April 2006 amended judgment.[2]

On November 30, 2007, the district court granted First Health's motion for a permanent injunction and stay of proceedings. The district court agreed that Gunderson violated the district court's October 2006 preliminary injunction when it continued to file and prosecute claims against First Health's payors in the Louisiana Office of Workers' Compensation ("OWC"). On January 2008, the district court granted a motion to amend the November 2007 judgment, to correct the time period regarding Gunderson's contract with First Health.

On January 10, 2008, Gunderson filed a notice of appeal from the November 2007 judgment, permanent injunction, and stay order, as well as the January 2008 amended judgment, permanent injunction, and stay order. On appeal, Gunderson argues that the district court erred when it applied the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, to this case.

On May 16, 2008, First Health filed a motion to dismiss the appeal for lack of jurisdiction.

II. APPELLATE JURISDICTION

First Health contends that Gunderson claims to appeal from the district court's November 2007 and January 2008 judgments granting the permanent injunction, but in actuality Gunderson is impermissibly attempting to appeal for the first time the October 2006 and April 2006 judgments granting the preliminary injunction. First Health refers to the preliminary injunction as the "original injunction." First Health claims the permanent injunction served merely to clarify the preliminary injunction and is not independently appealable; therefore, this Court has no jurisdiction to hear the appeal because Gunderson failed to appeal from the preliminary injunction.

First Health acknowledges that 28 U.S.C. § 1292(a)(1) grants this Court jurisdiction to entertain appeals from "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."[3] But First Health argues that the permanent injunction served merely to clarify the scope of the earlier preliminary injunction, and "interlocutory appeals are not allowed when a court merely enforces or interprets a previous injunction." *Ingram Towing Co. v. Adnac Inc.*, 59 F.3d 513, 516 (5th Cir. 1995). Gunderson argues that it is well settled that once an order of permanent injunction is granted, the order of preliminary injunction is merged with it and an appeal is proper only from the order granting the permanent injunction. *Louisiana World Exposition, Inc. v. Logue*,

746 F.2d 1033, 1038 (5th Cir. 1984); *SEC v. First Fin. Group*, 645 F.2d 429, 433 (5th Cir. 1981) (internal citations omitted).

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The district court did not merely enforce or interpret the preliminary injunction. Instead, the district court broadened the scope of the injunction and converted the preliminary injunction into a permanent injunction. In this situation, under *First Financial Group* and *Louisiana World Exposition, Inc.*, an appeal is proper *only* from the order granting the permanent injunction. First Health's argument that Gunderson waived the opportunity to appeal the validity of issues related to the original preliminary injunction fails, because the permanent injunction merged the two injunctions into one.

The motion to dismiss for lack of jurisdiction is, therefore, DENIED. We now turn to Gunderson's appeal from the district court order.

III. ANALYSIS

A. Standard of Review

The district court's decision to issue a permanent injunction is reviewed for abuse of discretion. *Regions Bank v. Rivet*, 224 F.3d 483, 488 (5th Cir. 2000) (citation omitted). "The application of the relitigation exception is an issue of law, and therefore this [C]ourt reviews de

novo the lower court's determination that an injunction may be issued under that exception." *Id.*

B. Discussion

The issue on appeal is the permanent injunction issued by the district court on January 2008. Gunderson appeals the portion of the injunction which enjoins claims against First Health and/or its "unidentified payors." Gunderson does not appeal the permanent injunction applicable to claims against Liberty Mutual.

Gunderson makes four basic arguments to support the conclusion that the district court erred in granting a permanent injunction in favor of First Health and its payors: (1) that the district court improperly applied the All Writs Act and the relitigation exception of the Anti-Injunction Act; (2) that the district court lacked subject matter jurisdiction; (3) that the absence of a judgment between Gunderson and First Health precludes the relief granted by the district court; and (4) that including First Health's "payors" within the scope of the injunction rendered the injunction too general to pass muster under Federal Rule of Civil Procedure ("Rule") 65.

1. All Writs Act and the Relitigation Exception

Gunderson contends that it was improper for the district court to rely upon the All Writs Act and the relitigation exception to the Anti-Injunction Act to enjoin Gunderson from pursuing claims pending in both Louisiana state court and in the OWC. As explained in *Regions Bank v. Rivet*, this Court utilizes a four-part test to determine whether the relitigation exception to

the Anti-Injunction Act applies to preclude litigation of a claim in state court. 224 F.3d at 488. Specifically,

> (1) "the parties in a later action must be identical to (or at least in privity with) the parties in a prior action"; (2) "the judgment in the prior action must have been rendered by a court of competent jurisdiction"; (3) "the prior action must have concluded with a final judgment on the merits"; and (4) "the same claim or cause of action must be involved in both suits."

Id. (5th Cir. 2000) (citations omitted). Gunderson argues that these requirements are not met in this case. We disagree. This section will address *Regions Bank* factors one, three, and four. Factor two is discussed below as it is related to a separate claim made by Gunderson.

A. Factor One

To the extent that Gunderson attempts to bring any claims, whether in federal court, state court, or the OWC, against Liberty Mutual involving the district court's ruling at the summary judgment stage, the parties in the future actions would be identical, and *res judicata* applies. *Vines v. Univ. of La.*, 398 F.3d 700, 709 (5th Cir. 2000). Gunderson does not dispute that he is precluded from bringing any claims of this nature against Liberty Mutual.

Further, this Court finds that First Health and its "payors" are in privity with Liberty Mutual. "Privity is a 'legal conclusion that the relationship between the one who is a party on the record and the non-party is

sufficiently close to afford application of the principle of preclusion.'" *Id.* at 706. As this Court explained in *Howell Hydrocarbons, Inc. v. Adams*, a party is in privity with a party for *res judicata* purposes "if the party adequately represented his interest in the prior proceeding." 897 F.2d 183, 188 (5th Cir. 1990). Liberty Mutual and other "payors" entered into Provider Agreement contracts with First Health. Liberty Mutual and First Health actively disputed Gunderson's claims that (1) the discount provisions contained in the Provider Agreements are unenforceable, and (2) that the payment provisions contained in the Provider Agreements do not apply to group purchasers or to agreements of group purchasers. The contractual relationship between First Health and its payors, as well as the identical litigation position against Gunderson in suits over these contractual provisions, evidence to this Court that First Health and its "payors" are in privity with Liberty Mutual. Factor One is satisfied.

B. Factor Three

Factor Three requires that the prior action conclude with a final judgment on the merits. The district court's use of the relitigation exception and decision to issue a permanent injunction were based on its summary judgment ruling in favor of Liberty Mutual. Gunderson abandoned any ability to appeal the district court's summary judgment ruling.[4] Factor Three is satisfied.

C. Factor Four

Factor Four requires that both disputes involve the same claim or cause of action. The claims at issue in the

instant case, and the claims filed by Gunderson in the OWC, all involve discount and payment provisions in Provider Agreements between First Health and Gunderson. First Health's payors provided payments to Gunderson under the provisions found in these Provider Agreements between First Health and Gunderson. Gunderson repeatedly attempted to make claims against First Health's payors, arguing that the payors improperly discounted rates for their services under these Agreements, despite the district court's rejection of that very argument in its ruling that the Provider Agreements are valid and enforceable.

In addition, collateral estoppel precludes Gunderson from pursuing any future claims that would involve relitigating the issues decided by the district court when it granted summary judgment against Gunderson. *Vines*, 398 F.3d at 709 (explaining that collateral estoppel requires the same issue, fact, or law be actually litigated and determined in a prior judgment). Gunderson is barred from attempting to bring a claim in federal court, state court, or the OWC that would involve deciding the validity of the discount or payment provisions contained in Provider Agreements between First Health and its payors. The district court decided these issues on summary judgment, and Gunderson abandoned its appeal of the rulings contained in the district court's grant of summary judgment. Factor Four is satisfied.

2. Subject Matter Jurisdiction (Regions Bank Factor Two)

Gunderson alleges that the district court did not have subject matter jurisdiction to decide the instant case.

To demonstrate the district court's lack of subject matter jurisdiction, Gunderson points to similar lawsuits where the same district court found that it lacked jurisdiction. *See Sentry v. Lake Charles Mem'l*, 2:06-cv-00570, 2008 U.S. Dist. LEXIS 44183 (W.D. La. June 4, 2008); *AIG v. Gunderson*, 2:05-cv-247 (W.D. La. May 11, 2005); *Gunderson v. F.A. Richard & Assocs.*, 2:04-cv-1242, 2005 U.S. Dist. LEXIS 41625 (W.D. La. Mar. 23, 2005).[5] Gunderson, however, in making this argument ignores that the district court had proper diversity jurisdiction over this case. The Supreme Court explained in *Horton v. Liberty Mutual Insurance Co.* that state workers' compensation claims may be removed to federal district courts if diversity jurisdiction exists. 367 U.S. 348, 352, 81 S. Ct. 1570, 6 L. Ed. 2d 890 (1961). *Regions Bank* Factor Two requires the court have "competent" jurisdiction, but does not specifically require that the court using the relitigation exception to the Anti-Injunction Act have subject matter jurisdiction over the case. *Regions Bank*, 224 F.3d at 488 (citation omitted). The district court properly found that it maintained diversity jurisdiction over this case.

3. Final Judgment on the Merits Between Gunderson and First Health

Gunderson next argues that the district court erred in issuing the injunction, because "Plaintiffs in both suits must have asserted the same claim or cause of action, the federal court's underlying judgment must be 'final', [*sic*] *and the federal and state proceedings must involve identical parties.*" Gunderson then provides a citation to *Regions Bank*. Gunderson misunderstands what is required by the relitigation exception. The four factor

test outlined in *Regions Bank* does not require a final judgment on the merits between Gunderson and First Health. *Regions Bank*, 224 F.3d at 488 (citation omitted). The test does, however, require a final judgment on the merits. As discussed above, the district court issued a final judgment when it granted summary judgment in favor of Liberty Mutual. While this Court acknowledges that the grant of summary judgment was limited to a finding in favor of Liberty Mutual, we also find that First Health and its payors are in privity with Liberty Mutual for purposes of the relitigation exception. The district court specifically ruled on the validity of Provider Agreements entered into between Gunderson and First Health in its summary judgment ruling.

4. Federal Rule of Civil Procedure 65

Gunderson argues that enjoining actions against parties who are not identified (or identifiable without initiating litigation), violates the rule of specificity for injunctions. Gunderson asserts that the permanent injunction is impermissibly vague, overbroad and hard to ascertain in that it fails to name or otherwise identify the 'payors' of First Health. Rule 65(d) requires specificity; "[a]n injunction must simply be framed so that those enjoined will know what conduct the court has prohibited." *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir. 1981). The district court correctly noted that the Provider Agreements between First Health and Gunderson required First Health to provide a payor listing to Gunderson. *Liberty Mutual*, No. 04-cv-2405, 2006 U.S. Dist. LEXIS 10278, *9 (Mem. Ruling). First Health complied with these requirements, and provided Gunderson with payor

listings. Therefore, this Court holds that the permanent injunction is framed in a manner that enables Gunderson to know what conduct the district court prohibited.

IV. CONCLUSION

For the foregoing reasons, First Health's motion to dismiss for lack of jurisdiction is DENIED. The district court's grant of a permanent injunction against Gunderson is AFFIRMED.

Footnotes

*Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

1District courts have the power to issue a narrowly tailored injunction under the All Writs Act to enjoin "repeatedly vexatious litigants from filing future state court actions." *Newby v. Enron Corp.*, 542 F.3d 463, 2008 U.S. App. LEXIS 19167, *5 (5th Cir. 2008).

2The Anti-Injunction Act, 28 U.S.C. § 2283, generally prohibits federal courts from interfering with state court proceedings. Under the statute, a United States court may not grant an injunction to stay proceedings in a state court unless it is (1) expressly authorized by Congress; (2) where necessary in aid of its jurisdiction; or (3) to protect or effectuate its judgments. The later of these three exceptions is commonly referred to as the "relitigation exception" to the Anti-Injunction Act. *See Duffy & McGovern Accommodation Servs. v. QCI*

Marine Offshore, Inc., 448 F.3d 825, 828 (5th Cir. 2006) (stating that "a federal court can enjoin state proceedings threatening to ignore an earlier, preclusive federal court order").

3Gunderson notes that before the deadline to appeal the November 2007 injunction passed, First Health timely filed an unopposed motion to amend the injunction to correct an inaccurate date. The district court then issued the January 2008 amended judgment, and in accordance to Federal Rule of Appellate Procedure 4(a)(1), Gunderson and LCMH timely filed a notice of appeal of that order.

4On May 9, 2006, Gunderson appealed the district court's grant of summary judgment. This Court dismissed the appeal for lack of jurisdiction in a *per curiam* opinion without explanation. Based on the briefs filed, this Court finds that the appeal was dismissed for lack of jurisdiction because Gunderson improperly attempted to appeal the district court's denial of a 12(b)(6) motion to dismiss. *See* Appellee's Mot. to Dismiss the Appeal for Lack of Juris. in *Liberty Mutual Insurance Co. v. Gunderson*, No. 06-30545, (5th Cir. 2006) (unpublished decision). Gunderson failed to brief the only appealable issue, the district court's grant of summary judgment in favor of Liberty Mutual, and therefore abandoned that issue on appeal.

5The findings in the other cases are irrelevant; however, this Court notes that the district court distinguished the instant case from each one of the decisions cited by Gunderson to argue that the district court lacked subject matter jurisdiction. On *de novo* review, this Court must make an independent

determination regarding subject matter jurisdiction.

DOCKET NO. 04-2405

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA,
LAKE CHARLES DIVISION

LIBERTY MUTUAL INSURANCE COMPANY

VS.

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL

November 30, 2007, Decided
November 30, 2007, Filed

JAMES T. TRIMBLE, JR., UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE METHVIN.

MEMORANDUM RULING

Before the Court is a "Motion for Civil Contempt and Sanctions and for Permanent Injunction and Stay of Proceedings Pursuant to the All Writs Act" (doc. # 136) filed by Liberty Mutual Insurance Company ("Liberty Mutual") and a "Motion for Civil Contempt and Sanctions and for Permanent Injunction and Stay of Proceedings Pursuant to the All Writs Act" (doc. # 146) filed by First Health Group Corp. ("First Health"), wherein the movers seek to permanently enjoin defendants, Clark A. Gunderson ("Gunderson") and Lake Charles Memorial Hospital ("LCMH") from relitigating in the Louisiana state workers' compensation system those factual and legal issues actually decided by this Court's February 15, 2006

Memorandum Ruling and April 12, 2006 Amended Judgment. Liberty Mutual and First Health also seek to hold Gunderson and LCMH in contempt of this Court's "Preliminary Injunction and Stay Order" dated October 30, 2006. [1]

FACTUAL STATEMENT

For a complete recitation of the facts in this suit seethe Memorandum Ruling dated February 15, 2006. [2]

PROCEDURAL HISTORY

Pursuant to a motion for summary judgment filed by the Plaintiffs and a motion to strike filed by the defendants to this suit, [3] this Court made the following rulings: (1) the discount provisions in the Provider Agreements between First Health and Gunderson and LCMH are valid and enforceable because there are no prohibitions in the Louisiana Workers' Compensation law that prevent a provider from agreeing to charge and receive discounted rates for the services they provide to occupationally ill or injured workers, and (2) the payment provisions of the Provider Agreement between Liberty Mutual and Gunderson and LCMH are not null and void because Louisiana Revised Statute § 40.2203.1 [4] expressly states that the notice requirement provisions shall not apply to group purchasers (First Health) or to agreements of a group purchaser (payors such as Liberty Mutual who have an agreement with First Health).

By Amended Judgment dated April 12, 2006, [5] the Court directed entry of a Final Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Gunderson and LCMH appealed the ruling to the Fifth Circuit Court of Appeal, however, the appeal was

dismissed for lack of jurisdiction on October 6, 2006. [6] Thus, the Amended Judgment is final.

In response to Gunderson and LCMH's continued prosecution of claims under the Any Willing Provider Act, First Health filed a "Motion for Temporary Restraining Order, Preliminary and Permanent Injunction and Stay of the State Court Proceedings Pursuant to the All Writs Act" [7] on October 24, 2006. On October 30, 2006, this Court issued a Preliminary Injunction and Stay Order granting the temporary restraining order and preliminary injunction which enjoined and prevented defendants, Clark A. Gunderson, M.D. and Lake Charles Memorial Hospital "from pursuing any claim before any court arising under the Louisiana Any Willing Provider Act, La. R.S. 40:2201 et seq. against First Health Group Corporation or any Payor as set forth in the provider agreements between First Health and Defendants. . . ." The Court subsequently denied a "Motion to Vacate" filed by Defendants. [8]

LAW AND ANALYSIS

First Health's motion for an injunction and/or stay order

First Health maintains that Gunderson and LCMH actively seek to relitigate in the Louisiana state workers' compensation system issues fully litigated and decided by this Court, specifically referring to the Court's rulings that (1) Louisiana law, including the Louisiana Workers' Compensation Act, permits discounting of medical bills for treatment rendered to occupationally ill or injured workers, and (2) First

Health and its contractual payors are exempt from the notice requirements of Louisiana Revised Statute 40:2203.1(A). First Health seeks a permanent injunction and stay order under the All Writs Act [9] to enjoin Gunderson and LCMH from relitigating in the Louisiana state workers compensation system those factual and legal issues actually decided by this Court's February 15, 2006 Memorandum Ruling and Amended Judgment. First Health also seeks to hold Gunderson and LCMH in civil contempt of the October 30, 2006 Preliminary Injunction and Stay Order.

First Health complains that Defendants continue to file suit, albeit in the Office of Workers' Compensation ("OWC"), against payors that have contracted with First Health, and refuse to dismiss the actions. First Health asserts that the claims are for underpayment of medical bills which seek penalties and attorney fees for arbitrary and capricious handling of the claims. [10] First Health further asserts that each of these suits claims that the FPO contract is unenforceable under Louisiana Revised Statute 40:2203.1 (B) and (D) because of the absence of proper notice as required by the Any Willing Provider Act.

Defendants maintain that First Health is attempting to use a contract to take discounts for occupationally injured workers that was amended as of December 1, 2004 and terminated as of June 14, 2005. [11] The effect of the amended Provider Agreement was to remove workers' compensation from the contract. Even though First Health argues that the June 14, 2005 letter terminated the contract on June 1, 2006 with existing patients terminating August 1, 2006, First Health concedes that they are only seeking an injunction and

stay pursuant to the Provider Agreement that was in effect from January 1, 2000 until November 30, 2004. Be that as it may, First Health is correct in that the prior preliminary injunction only applied to claims during the time period when the governing agreement between the parties was effective which is from January 1, 2000 until November 30, 2004. Hence, any permanent injunction could only apply to claims made during this period of time.

Defendants complain that First Health "neglected to inform the Court that they had sent Dr. Gunderson a PPD contract which did not include Appendix 'A' attached to the First Health contract." [12] Thus, Defendants argue that without Appendix A attached to the contract, [13] Gunderson's contract with First Health requires payment of the Louisiana Fee Schedule under Section 4.2(e). In his affidavit, [14] Dr. Gunderson declares that "he is quite certain that the contract he executed with First Health in 2001 did not contain Appendix "A." [15] Dr. Gunderson further declares that "[a]t the time the First Health PPa contract was executed by me, one of my staff members, Leslie Zimmerman, had to call First Health to obtain the reimbursement data. This would not have been necessary if Appendix A was attached. Ms. Zimmerman was never informed by First Health that

Appendix A contained a workers' compensation PPG discount." [16] In rebuttal, First Health submits a 2001 File Maintenance Record of Dr. Gunderson that includes an application/contract checklist, a physician application signed by Dr. Gunderson, a workers compensation questionaire signed by Dr. Gunderson, a checklist for a completed application, an application

cover sheet and a contract executed by Dr. Gunderson which clearly includes Appendix "A." The application/contract checklist has marked that the record contains a "Correct Appendix A. [17] The Physician application, executed by Dr. Gunderson states that he provides workers' compensation services. [18] The workers' compensation questionaire asks the following question: "My practice is currently open to new workers' compensation patients." There is an "X" marked by the "Yes" column. This questionaire is signed by Dr. Gunderson. The checklist for a completed application states that a "**Signed** original Contract Agreement with Appendix A [is] attached." [19] The application cover sheet which reveals information found to be missing or incomplete remarks that the only document or information missing is "ME - Malpractice Experience." [20] Finally, the signed contract includes Appendix A which contains the reimbursement rates for services rendered to occupationally ill/injured employees. [21] The executed Provider Agreement provides that the "Payor shall be liable for the lesser of the Provider's billed charges or the amount set forth in Appendix A of this Agreement. . ."[22] Without Appendix A, Dr. Gunderson would not have known what his reimbursement rates would be for any services he provided. The Court finds no merit to Dr. Gunderson's allegation that First Health did not send Appendix A with the contract.

Defendants maintain that First Health is taking unauthorized discounts from a variety of workers' compensation payors who continue to take First Health PPO discounts even though there is no contract to take such a discount. Defendants submit numerous First Health PPO discounts taken by various workers'

compensation payors. [23] The Court agrees that if the payors did not have a contract with First Health during the period of time in which Dr. Gunderson had a Provider Agreement that allowed for discounting workers' compensation claim, such discounts are invalid. However, the Court agrees with First Health that out of network EOB's are irrelevant to the injunction that First Health is seeking because it would only apply to payors who had a contract with First Health during the time period Dr. Gunderson and/or LCMH had a Provider Agreement with First Health that allowed discounting for occupationally ill/injured workers.

Defendants assert that claims against many payors also include late payments either pursuant to Louisiana law and/or under the terms of the PPO contract itself. Obviously, the issue of late payment is irrelevant to the injunction being sought by First Health. Defendants are free to pursue any claims for late payment against the payors that are allegedly in violation of either Louisiana law or the PPO contract itself.

Defendants maintain that this Court cannot issue another injunction because First Health has not been made a defendant in any action by Gunderson and LCMH since the October 30, 2006 Preliminary Injunction and Stay Order. Defendants then argue that the All Writs Act only allows an injunction to be brought by someone who was actually a party to the Federal Judgment citing *Deus v. Allstate Ins. Co.* [24]

The All Writs Act authorizes federal courts "to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles

of law." [25] This power dovetails with the relitigation exception to the Anti-Injunction Act, which, although generally prohibits federal courts from enjoining state proceedings, it permits a court to enjoin a state court "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." [26]

Generally, to obtain a permanent injunction, a petitioner must show "a clear threat of continuing illegality portending immediate harmful consequences irreparable in any other manner." [27] However, to obtain an injunction under the relitigation exception to the Anti-Injunction Act, no independent demonstration of irreparable harm or lack of alternative remedies is necessary. Rather, demonstrating that the matter satisfies the prerequisites of the relitigation exception is sufficient to demonstrate both the harm of continuing the state litigation and the lack of an adequate remedy at law. [28]

The relitigation exception is grounded in principles of *res judicata* and collateral estoppel. [29] Courts apply the tests used for those doctrines to determine whether an injunction is warranted. [30] "[F]ederal law applies to determine the preclusive effect of federal judgment in federal court, even for purposes of enjoining state proceedings. [31] To determine whether res judicata precludes relitigation of a claim in a state proceeding, the Court must determine whether: (1) the parties in this action are identical to (or at least in privity [32] with) the parties in the workers' compensation actions; (2) the judgment in this action was rendered by a court of competent jurisdiction; (3) this action concluded with a final judgment on the merits; and (4) the same claim or cause of action is involved in both suits.[33]

This Court has determined that it has jurisdiction over the matter based on complete diversity. The Court has ruled that the workers compensation act does not prohibit discounting for services rendered to occupationally injured/ill patients, and that the notice requirements of the Any Willing Provider Act are not applicable to First Health (as a group purchaser) or to payors that have an agreement with First Health. On October 12, 2006 this Court rendered a final judgment. Hence, the only question remaining is whether or not non-parties to this suit can be included within the scope of this Court's injunction and/or stay order.

Privity has been described as nothing more than a "legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion." [34] Privity exists where, for example, a party's claim is derivative of the original party's claim. [35] To the extent that a payor had a contract with First Health that allowed for discounts to be taken for an occupationally ill/injured worker during the time period in which Dr. Gunderson or LCMH and First Health had a Provider Agreement, the Court finds that privity exists between First Health and that payor which allows said payor to be included within the scope of this Court's injunction and/or stay. In other words, Gunderson and LCMH can not prosecute claims against any payor that had a contract with First Health during the time period (January 1, 2000 - November 30, 2004) in which First Health had a Provider Agreement with either Gunderson or LCMH that involves claims for underpayment for discounting services for workers compensation patients, and/or failing to comply with the notice requirement provisions of Louisiana Revised

Statute § 40.2203.1. Accordingly, in order to effectuate this Court's Memorandum Ruling of February 15, 2006 and the Amended Judgment of April, 12, 2006, First Health's motion for a permanent injunction and/or stay will be granted.

Liberty Mutual 's motion for an injunction and/or stay

Liberty Mutual also seeks to permanently enjoin Gunderson and LCMH from filing or prosecuting claims in the Office of Workers' Compensation involving issues already decided by this Court in the February 15, 2006 Memorandum Ruling and April 12, 2006 Amended Judgment. Liberty Mutual also seeks to have this Court find Gunderson and LCMH in contempt for violating the preliminary injunction dated October 30, 2006. [36]

Liberty Mutual maintains that Gunderson and LCMH have continued to file and prosecute claims against it in the OWC in direct violation of this Court's October 30, 2006 preliminary injunction and a Stay Agreement entered into between First Health and Gunderson and LCMH dated May 7, 2007. Liberty Mutual argues that the claims being sought by Gunderson and LCMH involve the same claims decided by this Court in its February 15, 2006 Memorandum Ruling and April 12, 2006 Final Judgment (the claims involve the validity and enforceability of the Provider Agreements and PPO Contracts). Thus, Liberty Mutual seeks a permanent injunction to cease the filing and prosecuting of these particular claims against it in the OWC.

Counsel for Gunderson and LCMH maintains that on August 29, 2007, he dismissed all claims that Liberty

Mutual complains about, thus a preliminary injunction is not necessary. Liberty Mutual points out that these dismissals were without prejudice, which is not enough to preclude issuance of a permanent injunction. Liberty Mutual further asserts that neither the preliminary injunction issued by this Court, nor the Stay Agreement between First Health and Gunderson and LCMH stopped these defendants from filing and prosecuting claims against it. Hence, Liberty Mutual argues that a permanent injunction is indeed necessary. Furthermore, Liberty Mutual argues that the relitigation exception has been satisfied in that res judicata or collateral estoppel would bar the subsequent state litigation. The Court finds that Liberty Mutual's argument has merit and agrees that in order to give this Court's previous Memorandum Ruling and Amended Judgment any effect at all, a permanent injunction and/or stay order is necessary.

Civil Sanctions

First Health and Liberty Mutual both seek to have this Court find that defendants, Gunderson and LCMH are in civil contempt for allegedly violating this Court's October 30, 2006 Preliminary Injunction and Stay Order. The Order stated that:

> pursuant to the All Writs Act, 28 U.S.C. § 1651(a), a temporary restraining order and preliminary injunction is hereby issued enjoining and preventing Defendants Clark A. Gunderson, M.D. and Lake Charles Memorial Hospital ("Defendants") from pursuing any claim before any court arising under Louisiana's Any Willing Provider

> Act, La.R.S. 40:2201, *et seq.* against First Health Group Corporation or any Payor as set forth in the provider agreements between First Health and Defendants, including without limitation pursuing such claims in the matter styled *Gunderson et al v. F.A. Richard, et al* ., Case No 2004-002417 currently pending in the 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana.

First Health maintains that notwithstanding this Court's rulings and the preliminary injunction, Gunderson and LCMH have instituted numerous actions against Payors who have contracted with First Health in the Louisiana workers' compensation courts that directly contravene the injunction. First Health argues that the actions raise issues decided by this Courtin the February 15, 2006 Memorandum Ruling, and that Gunderson and LCMH refuse to dismiss said actions. First Health seeks to have this court impose an appropriate sanction against these defendants. First Health complains that it has received or been threatened by its payor community with numerous third party demands asserting claims for indemnification (one of these claims has been settled despite this Court's ruling). [37] First Health then complains that it has expended substantial monies defending these indemnity claims, and that more resources will be wasted unless Gunderson and LCMH are enjoined from continuing to prosecute and settle these claims.

Liberty Mutual complains that Gunderson and LCMH violated the Injunction by filing and continuing to

pursue claims against it in the OWC. Liberty Mutual seeks attorneys fees and costs for filing this motion and for litigating the OWC claims filed by defendants.

Gunderson and LCMH maintain that at the time the injunction was issued, the only claim arising out of Louisiana Revised Statute 40:2241. *et seq.* against First Health or any of its payors was the *Gunderson* suit in the 14th Judicial District Courts, and that counsel for defendants contacted that court in an effort to comply with this Court's Order. Counsel then maintains that "[t]o date, no additional suits arising under LSA-R.S. 40:2201 et seq. have been filed by LCMH and Gunderson against First Health or any payor." [38] Defense counsel argues that his filing and/or pursuing of workers' compensation claims does not violate this Court's Injunction since it does not cover workers' compensation claims and makes no mention of enjoining claims before the Louisiana OWC.

Defense counsel asserts that this Court has held that the Louisiana OWC is not a "court," but is an administrative agency. Thus, counsel argues that because the OWC is an administrative agency, by its own terms the Injunction does not apply to claims before the OWC. Liberty Mutual concedes that the OWC is not a La. Const. Art. V, § 16(A) "court" for all purposes, however, it is a "court of competent jurisdiction" for purposes of the AWPA citing *Southwest Louisiana Hospital Association, d/b/a Lake Charles Memorial Hospital v. Superior Carriers, Inc.* [39]. Given the potential for any possible ambiguity of this Court's intention regarding the Injunction that enjoined Gunderson and LCMH from filing these claims in "any court," the Court will not grant the motions for

sanctions filed by First Health and Liberty Mutual. However, the Court will broaden the scope of the permanent injunction to include any claims in any court *or administrative agency* in the State of Louisiana, and any claims that allege that the Louisiana Workers' Compensation Act prohibits discounting of medical bills for treatment rendered to occupationally ill or injured workers.

CONCLUSION

Based on the foregoing, the motions for civil contempt and sanctions and/or permanent injunction and stay of proceedings will be granted in part and denied in part. The motions for civil contempt will be denied; the motions for a permanent injunction and stay of proceedings will be granted.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 30th day of November, 2007.

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

Footnotes

1 Doc. # 116.

2 Doc. # 95.

3 Does. # 70, 73, and 79.
4 The Any Willing Provider Act, La. R.S. 40:2201, *et seq.*

5 Doc. # 105.

6 Doc. # 111. Gunderson and LCMH did not appeal the merits of the ruling; they only appealed on jurisdictional grounds.

7 Doc. # 112.

8 Doc. # 128, dated December 7, 2006.

9 28 U.S.C. § 1651(a).

10 Plaintiff's Exhibit C includes the following claims: *James Broussard v. Sasol North America, Inc.*, No. 06-00896, filed on behalf of Dr. Clark A. Gunderson; *Rose Provost v. Motel 6*, No. 04-03598, filed on behalf of Dr. Clark A. Gunderson; *Lake Charles Memorial Hospital v. Turner Industries, Ltd., No. 04-46615.* First Health alleges that these claims are merely illustrative of the several hundred claims filed by Defendants that implicate the First Health agreements.

11 Defendants' Exhibits B and C.

12 Defendant's opposition, p. 6.

13 Appendix A, among other reimbursements, provides for the discounting of services far workers' compensation patients.

14 Defendants' Exhibit F.

15 Appendix A references a PPQ discount for workers' compensation and Dr. Gunderson states in his affidavit that he had the copy faxed to him from First Health.

16 Defendant's exhibit F, p. 2, §§ 5, 6.

17 Plaintiffs' Exhibit K.

18 *Id.*

19 *Id.*

20 *Id.*

21 The one page appendix also includes other reimbursement rates.

22 Plaintiff's exhibit K, p.5 § 4.2 a) **REIMBURSEMENT PROCEDURE.**

23 Defendant's exhibit E, in globo.

24 15 F.3d 506 (5th Cir. 1994)

25 28 U.S.C. § 1651.

26 28 U.S.C. § 2203.

27 *See, e.g., Posada v. Lamb County*, 716 F.2d 1066, 1070 (5th Cir. 1983).

28 *See, e.g. Ballenger v. Mobil Oil Corp.*, 138 Fed. App'x 615 (5th Cir. 2005); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 667 (5th Cir. 2003); *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 721 (5th Cir. 1990).

29 *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684, 100 L. Ed. 2d 127 (1988).

30 *Vasquez*, 325 F.3d at 675-76.

31 *Duffy & McGovern Accommodation Services v. QCI Marine Offshore, Inc.*, 448 F.3d 825, 830 n.16 (5th Cir. 2006).

32 *See Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279, 1287-88 (5th Cir. 1989) (a district court may include privity of parties within the scope of its injunction).

33 *Regions Bank v. Rivet*, 224 F.3d 483, 488 (5th Cir. 2000); *N.Y. Life Ins. Co. v. Gillispie*, 203 F.3d 384, 387 (5th Cir. 2000).

34 *Southwest Airlines, Inc. v. Texas Intl' Airlines, Inc.* 546 F.2d 84, 95 (5th Cir. 1977).

35 *See Terrell v. Deconna*, 877 F.2d 1267, 1270-73 (5th Cir. 1989); *Meador v. Oryx Energy Co.*, 87 F.Supp.2d 658, 665 (E.D. Tex. 2400).

36 Doc. # 116.

37 See First Health's Exhibit G, Third Party Demand, *James Broussard v. Sasol North America, Inc.*, No. 06-00896, OWC, District 03; Exhibit H, Third Party Demand, *Lake Charles Memorial Hospital v. Albertson's*, OWC, No. 04-07455, District 03.

38 Defendants' Opposition, p. 9.

39 942 So.2d 754 (La.App. 3 Cir. 2006)

DOCKET NO. 04-2405

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

LIBERTY MUTUAL INSURANCE COMPANY

VS.

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL

February 15, 2006, Decided

JAMES T. TRIMBLE, JR., UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE WILSON.

MEMORANDUM RULING

Before the Court are three (3) motions: (1) Motion for Summary Judgment (doc. # 70) filed by First Health Group Corp., (2) Motion to Strike the Motion for Summary Judgment (doc. # 73) filed by defendants, Clark Gunderson and Lake Charles Memorial Hospital, and (3) Motion for Partial Summary Judgment (doc. # 79) filed by Liberty Mutual Insurance Co.

FACTUAL STATEMENT

Liberty Mutual entered into an agreement ("PPO Contract") with First Health Group Corporation ("First Health") whereby First Health agreed to make

available to Liberty Mutual various hospitals and medical providers. [1] Defendants, Dr. Clark Gunderson ("Gunderson") and Lake Charles Memorial Hospital ("LCMH") entered into "Provider Agreements" with First Health for the delivery of medical services at discounted rates to "Payors" [2], namely in this suit, Liberty Mutual. [3] Gunderson and LCMH have treated numerous employees of Liberty Mutual's insureds/employers in connection with workers' compensation claims. Liberty Mutual paid Gunderson and LCMH the negotiated rates in accordance with the Provider Agreements and the PPO Contract. Gunderson and LCMH, in another suit that was pending before this Court, [4] contend that the contracts they signed do not govern services provided in connection with workers' compensation claims. Gunderson and LCMH asserted in that suit that the payment provision of their Provider Agreements is null and void under the disclosure rules of Louisiana's Any Willing Provider Act, Louisiana Revised Statute 40:2203.1, because Plaintiffs (the preferred provider organizations and third party administrators) failed to comply with the statute's notice provisions. Thus, Gunderson and LCMH, assert that they are entitled to additional monies for medical services performed, in addition to statutory penalties and attorneys' fees.

Liberty Mutual filed this suit requesting that the Court enter a judgment declaring that (1) the Provider Agreements are valid and enforceable, (2) Liberty Mutual is obligated to pay Gunderson and LCMH only the negotiated rates for medical services performed, (3) Gunderson and LCMH are not entitled to be paid amounts in excess of the negotiated rates, (3) Gunderson and LCMH have no cause of action under

any law, statute, or regulation against Liberty Mutual, and (5) Gunderson and LCMH's efforts to receive additional monies violate their contracts which constitutes a breach of those contracts, entitling Liberty Mutual to damages and indemnity, including, but not limited to attorneys fees.

In its Second Amended Complaint, Liberty Mutual added as a defendant, First Health. Liberty Mutual alleges that pursuant to the PPO Contract, First Health represented and warranted that all of the PPO Contract's terms complied with applicable laws, and that "none of the activities to be performed hereunder ... are or shall be a violation of any applicable law ...." [5] Liberty Mutual maintains that pursuant to the PPO Contract, First Health agreed to "fully indemnify and hold harmless [Liberty Mutual] . . . from and against any and all claims, demands, loss damages, suits, causes of action and administrative proceedings and legal fees incurred in the defense thereof, whether in contract or in tort, arising out of or in connection with any breach of this Agreement by [First Health], or any negligent or wrongful act or omission of [First Health] ... in the performance of its duties under this Agreement." [6]

First Health filed a motion for summary judgment maintaining that because the Provider Agreements are valid and enforceable, First Health is not obligated to indemnify Liberty Mutual. Gunderson and LCMH filed a motion to strike First Health's motion for summary judgment alleging that it seeks a judgment on claims not asserted in the instant action, or alternatively, the indemnity claim against First Health should be dismissed on grounds of prematurity. Liberty Mutual filed a motion for partial summary judgment seeking a declaration against Gunderson and LCMH that the

Provider Agreements with First Health are valid and enforceable.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [7] As to issues which the non-moving party has the burden of proof at trial, the moving party may satisfy this burden by demonstrating the absence of evidence supporting the non-moving party's claim." [8] Once the movant makes this showing, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. [9] The burden requires more than mere allegations or denials of the adverse party's pleadings. The non-moving party must demonstrate by way of affidavit or other admissible evidence that there are genuine issues of material fact or law. [10] There is no genuine issue of material fact if, viewing the evidence in the light most favorable to the non-moving party, no reasonable trier of fact could find for the non-moving party. [11] If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." [12]

LAW AND ANALYSIS

Because the three instant motions are so intertwined, and for purposes of judicial efficiency, the Court will address each of the motions together. The Court will first address the issue of the validity of the Provider Agreements pursuant to Liberty Mutual's motion for partial summary judgment.

Is the payment provision of the Provider Agreements between First Health, Gunderson, and LCMH valid and enforceable?

Liberty Mutual entered into an agreement, the PPO Contract, with First Health whereby First Health agreed to make available to Liberty Mutual various hospitals and medical providers. Gunderson and LCMH directly contracted with First Health through Provider Agreements for the delivery of medical services at discounted rates. The Provider Agreements expressly state that the provider, Gunderson, "agrees to participate in a Preferred Provider Panel (PPO Plan) being created by First Health." [13] Likewise, LCMH also entered into a similar agreement with Affordable Medical Networks, [14] wherein it agreed to be a hospital provider in First Health's PPO network. [15]

Both Gunderson and LCMH agreed to provide their services through First Health's PPO network to certain "Payors", -- in this suit, Liberty Mutual -- at discounted rates. [16] Gunderson and LCMH agreed that the Payors would be liable only for the negotiated rates as set forth in the Provider Agreements. [17] Both Provider Agreements provided the negotiated discount rates for which the Payors would be liable. [18] Both Providers Agreements expressly stated the negotiated discount rates that applied to "Workers' Compensation Payors" [19] and/or "health care services rendered for occupationally ill/injured employees." [20] Both Provider Agreements obligated First Health to provide a list of "Payors" to Gunderson and LCMH. [21] Gunderson and LCMH have not alleged that First Health did not provide them with up-to-date Payor lists. Hence, Gunderson and LCMH were aware that when they treated any of Liberty

Mutual's patients, whether in connection with a regular health plan or a work related injury, the PPO Contract and Provider Agreements dictated the negotiated rates these providers would be paid.

Since joining with First Health, Gunderson and LCMH have treated numerous employees of Liberty Mutual's insureds/employers in connection with workers' compensation claims. Liberty Mutual has paid Gunderson and LCMH the negotiated rates in accordance with the Provider Agreements and the PPO Contract. These facts are undisputed.

Gunderson and LCMH contend that because they were not provided with a benefit card as required by Louisiana Revised Statute 40:2203.1, the payment provision of each Provider Agreement is null and void. The statute provides the following pertinent language:

> B. A preferred provider organization's alternative rates of payment shall not be enforceable or binding upon any provider unless such organization is clearly identified on the benefit card issued by the group purchaser or other entity accessing a group purchaser's contractual agreement or agreements and presented to the participating provider when medical care is provided. . . .

Both Liberty Mutual and First Health maintain that this provision does not apply because of the exemption from notice requirement set forth in Louisiana Revised Statute § 40:2203.1 which is as follows:

> A. Except as otherwise provided in this Subsection, the requirements of this Section

> shall apply to all preferred provider organization agreements that are applicable to medical services rendered in this state and to group [*12] purchasers as defined in this Part. ***The provisions of this Section shall not apply to a group purchaser when providing health benefits through its own networker or direct provider agreements or to such agreements of a group purchaser.*** (Emphasis added)

Gunderson and LCMH argue that because First Health does not provide health benefits through its own network -- instead, these benefits were provided by Liberty Mutual - then the exemption does not apply to the Provider Agreements. Likewise, Gunderson and LCMH also argue that because Liberty Mutual utilized someone else's network -- First Health's -- and Liberty Mutual did not have a direct agreement with either Gunderson or LCMH, the exemption does not apply. We disagree.

The purpose of the PPO statutes is to control the rising costs of providing quality health care benefits. [22] Louisiana courts have long held that a "statute should be construed so as to produce a reasonable result." [23] "The function of the courts is to interpret the laws so as to give them the meaning which the lawmakers obviously intended them to have and not to construe them so as to give them absurd or ridiculous meanings." [24]

A "group purchaser" is defined as "an organization or entity which contracts with providers for the purpose of establishing a preferred provider organization." [25] First Health is a group purchaser. The PPO Contract between Liberty Mutual and First Health is an

"agreement of [a] group purchaser [*i.e.* First Health]. Accordingly, the language of the statute is clear that the notice requirements do not apply to group purchasers when providing health benefits through their own network or ***to such agreements of group purchaser.*** This is the logical and reasonable interpretation of the statute and is in line with the Legislature's intent to contain escalating health care costs. Furthermore, and more significantly, this was the expectation of the parties when they entered into the PPO Contract and Provider Agreements.

We are further persuaded by First Health's arguments concerning the intent of the legislature that the notice provision at issue here applies to a "silent PPO" where there is no direct contract between the provider and the PPO. For example, when a PPO (such as First Health) makes an assignment to another PPO network. It is in those instances that the notice requirement provisions of Louisiana Revised Statute § 40:2203.1 become applicable because there is no direct contract between the provider and the PPO assignee.

Do the Workers' Compensation Laws prohibit discounting below the Fee Schedule?

Gunderson and LCMH maintain that Louisiana's Workers' Compensation Laws expressly prohibit the use of any contract which "operates to relieve an employer, in whole or in part, of any liability" created by the Louisiana Workers' Compensation Act. [26] Hence, they argue that the discount provision in the Provider Agreements runs afoul of the direct prohibition of such contracts in Louisiana Revised Statute 23:1033, and cannot be used by a Louisiana workers' compensation

carrier when paying a workers' compensation bill in the State of Louisiana. We disagree.

Louisiana Revised Statute 23:1033 prohibits a contract that operates "to relieve the ***employer,*** in whole or in part, from any liability created by this Chapter...." (Emphasis added). In *Jones v. General Motors Corp.*, [27] the Louisiana Supreme Court recognized that an agreement between employer and employee may waive or alter "statutorily established rights" so long as it is "clear and unambiguous." The Court also acknowledged that the Louisiana Workers' Compensation Act "is designed to benefit the injured worker" and read Louisiana Revised Statute 23:1033 to impose a "limitation on a contract which relieves the ***employer*** of *compensation* liability." [28] The Court does not find that the Provider Agreements have relieved the employer of its compensation liability, and we will not expand the literal interpretation of this statute.

In further support of this finding is the clear language of Louisiana Revised Statute 23:1034.2(E) which provides the following:

> Nothing in this Section shall prevent a health care provider from charging a fee for such care, services, treatment, drugs, or supplies that is ***less than*** the reimbursement established by the reimbursement schedule. (Emphasis added)

Furthermore, Louisiana Revised Statute 23:1203(B) provides further support for discounted or lower rates of reimbursement:

> The obligation of the employer to furnish such care, . . . is limited to the reimbursement determined to be the mean of the usual and customary charges for such care, . . . as determined under the reimbursement schedule annually published pursuant to R.S. 23:1034.2 ***or the actual charge made for the service, whichever is less.*** (emphasis added)

In summary, the Court concludes that there are no prohibitions in the Louisiana Workers' Compensation laws that prevent a provider from agreeing to charge and receive discounted rates for the services they provide to occupationally ill or injured workers.

Is First Health obligated by contract to indemnify Liberty Mutual?

In its motion for summary judgment, First Health maintains that it is not and cannot be obliged to indemnify Liberty Mutual for amounts purportedly due to defendants, Gunderson and/or LCMH, or to any other First Health contracted healthcare provider because the Provider Agreements are valid and enforceable as a matter of law and thus create no possibility for casting Liberty Mutual in liability. Under the PPO Contract, First Health agreed to the following:

> . . . to fully indemnify and hold harmless [Liberty Mutual] . . . from and against any and all *claims, demands, loss, damages, suits, causes of action and administrative proceedings* and *legal fees incurred in the defense thereof* whether in contract or in tort, arising out of or in connection with any breach of this Agreement by [First Health], or any negligent or wrongful act or

> omission of [First Health], or any negligent or wrongful act or omission of [First Health] . . . in the performance of its duties under this Agreement.

As previously held, the Court has determined that the Provider Agreements are valid and enforceable and the Workers' Compensation Laws do not prohibit discounting the providers' service fees below the Fee Schedule set forth in Louisiana Revised Statute 23:1034.2. To the extent that Liberty Mutual seeks indemnity from First Health for additional monies owed Gunderson and LCMH, First Health's motion for summary judgment will be granted as the Court has concluded that no additional monies are owed. As to Liberty Mutual's claim against Fist Health for attorney fees, however, the record establishes that Liberty Mutual made demand upon First Health for a defense and attorney fees, which First Health declined to provide. This action, though initiated by Liberty, was in response to claims being asserted against it by *Gunderson, et al*, and this Court holds that attorney fees so incurred are indemnifiable under the PPO Contract and will be awarded against First Health in this action.

Is the relief requested by First Health inappropriately before the Court?

In its motion for summary judgment, First Health seeks judgment in its favor, that it does not owe indemnity to Liberty Mutual because the Provider Agreements are valid and enforceable. In their motion to strike the motion for summary judgment, Gunderson and LCMH maintain that the motion seeks a judgment on claims not asserted in this action, or alternatively,

the claims of indemnity are premature. Gunderson and LCMH assert that the claims are not properly before the Court because *Gunderson, et al v. F.A. Richard, et al*, 2005 U.S. Dist. LEXIS 41625, Docket No. 04 CV 1242 was previously remanded back to state court due to improper removal. The *Gunderson, et al v. F.A. Richard* suit did not include Liberty Mutual as a defendant or claims of indemnity against First Health by Liberty Mutual. Furthermore, the indemnity claim is not premature. [29] Be that as it may, because the Court has decided the motion for summary judgment filed by Liberty Mutual, this motion is moot and First Health's motion for summary judgment is properly before the Court.

CONCLUSION

For the foregoing reasons, the motion for summary judgment filed by Liberty Mutual will be granted and the motion for summary judgment filed by First Health will be denied in part and granted in part. The Court concludes that the Provider Agreements are valid and enforceable and Liberty Mutual does not owe defendants, Gunderson and LCMH additional moneys, penalties or attorneys fees. Thus, First Health does not owe Liberty Mutual indemnity for any additional monies that might have been due to these defendants. However, First Health is liable to Liberty Mutual for attorney fees incurred in this action. The motion to strike the motion for summary judgment will be denied as moot.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 15th day of February, 2006.

JAMES T. TRIMBLE, JR.

UNITED STATES DISTRICT JUDGE

JUDGMENT

For the reasons set forth in the Memorandum Ruling of this date,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc. # 79) filed by Liberty Mutual Insurance Co. is hereby **GRANTED** relieving Liberty Mutual of any obligation to pay defendants, Dr. Clark Gunderson and Lake Charles Memorial Hospital any additional sums.

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc. # 70) filed by First Health Group, Inc., is hereby **GRANTED IN PART,** to the extent that First Health does not owe Liberty Mutual indemnity for underpayments sought by Defendants, Dr. Clark Gunderson and Lake Charles Memorial Hospital against Liberty Mutual, but **DENIED IN PART** to the extent First Health does owe indemnity to Liberty Mutual for attorney fees incurred in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Liberty Mutual has 30 days from this date to submit documentation to support its claims for attorney fees against First Health and First Health is granted 20 days thereafter to respond, after which the Court will decide the appropriate amount of the award of attorney fees.

IT IS ORDERED, ADJUDGED AND DECREED that the motion to strike (doc. # 73) filed by Dr. Clark Gunderson and Lake Charles Memorial Hospital is **DENIED** as **MOOT.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants, Gunderson and LCMH are to pay all costs of court.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 15th day of February, 2006.

JAMES T. TRIMBLE, JR.

UNITED STATES DISTRICT JUDGE

Footnotes

1 First Health's Exhibit A.

2 The First Health Provider Agreement defines a "Payor" as:

> An employer, trust fund, insurance carrier, health care service plan, trust, nonprofit hospital service plan, a governmental unit, any other entity which has an obligation to provide medical services or benefits for such services to Participating Patients, or any other entity which has contracted with First Health to use First Health's PPO Plan.

3 First Health's Exhibits B and C.

4 *Clark Gunderson, M.D., et al v. F.A. Richard & Associates, Inc., et al,* 2005 U.S. Dist. LEXIS 41625, Docket No. 04 CV 1242; on March 23, 2005, this Court ordered remand of the suit to state court.

5 Seconded Amended Complaint, P58.

6 Seconded Amended Complaint, P59.

7 Fed. R.Civ. P. 56(c).

8 *Vera v. Tue*, 73 F.3d 604, 607 (5th Cir. 1996).

9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

11 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

12 *Anderson*, 477 U.S. at 249-50.

13 Plaintiff's Exhibit B, P1.5.

14 First Health is a successor in interest to Affordable Medical Networks, Plaintiffs Exhibit C, entitled "Amendment to the Contract between Lake Charles Memorial Hospital Lake Charles, Louisiana and The *Affordable* Medical Networks."

15 Plaintiff's Exhibit C, PP1.5, 1.9, 3.1.

16 Plaintiff's Exhibit B, P2.8; Plaintiff's Exhibit C, P3.1.

17 Plaintiffs Exhibit B, P4.2; Plaintiffs Exhibit C, P Article 4.

18 Plaintiffs Exhibit B, Appendix A; Plaintiffs Exhibit C, Appendix A.

19 Plaintiffs Exhibit B, Appendix A, PD.

20 Plaintiffs Exhibit C, Appendix A, p.1.

21 Plaintiff's Exhibit B, P1.5 (". . . First Health will supply Provider [Gunderson] with list of all Payors that have entered into Agreements with First Health to utilize Provider's services."); Plaintiff's Exhibit C, P3.12 ("AFFORDABLE [First Health] shall periodically provide Contract Hospital [LCMH] with an up-to-date-list of all Payors and shall promptly advise Contract Hospital, in writing, of any changes in the Payor list.")

22 La. R.S. 40:2201.

23 *Bradford v. Louisiana Public Service Comm'n.*, 189 La. 327, 338, 179 So. 442 (1938); *Louisiana Municipal Ass'n. v. State*, 893 So.2d 809, 864 (La.2005).

24 *Webb v. Parish Council of Parish of East Baton Rouge*, 217 La. 926, 47 So.2d 718, 720 (1950); *Savoie v. Rubin*, 2001-3275 (La. 6/21/02), 820 So.2d 486, 488.

25 La. R.S. 40:2202(3).

26 La. R.S. 23:1033.

27 2003-1766 (La. 4/30/04), 871 So.2d 1109.

28 *Id*

29 *See Burns v. McDermott, Inc.*, 665 So.2d 76, 79 (La.App. 1st Cir. 1995)(although fault had not yet been determined, demand for indemnification of attorneys' fees pursuant to indemnity provision was not

premature); *Celestine v. City of Lake Charles*, 534 So.2d 146, 148 (La.App. 3d Cir. 1988)(issue of liability need not be determined before obligations under indemnity provisions of agreement can be fixed). Also, as noted by Liberty Mutual, this presumes that Louisiana law will apply. The PPO Contract does expressly state that Illinois law applies.

No. 08-30075 Summary Calendar
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee

v.

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL, Defendants-Appellants

January 12, 2009

Appeal from the United States District Court for the Western District of Louisiana. USDC No. 2:04-CV-2405.

ON PETITION FOR REHEARING

Before STEWART, OWEN, and SOUTHWICK, Circuit Judges .

PER CURIAM :*

The Petition for Rehearing is DENIED .

We write further because of the Appellants' suggestion that the Louisiana Supreme Court's recent case in Broussard Physical Therapy v . Family Dollar Stores, Inc., 2008-cc-1013 (La . Sup . Ct. 2008), strips this court of jurisdiction over the instant case. While the Louisiana Supreme Court's decision is

important to some of the issues raised in this litigation, the opinion is not relevant to the present appeal . Issues addressed in Broussard concerning the authority of the Office of Workers' Compensation are not before us, though they apparently were the subject of an earlier order of the district court . Because nothing in Broussard affects our finding in this appeal that there was diversity jurisdiction over the instant case, we deny rehearing . We also reject the Appellants' characterization of the holding in Horton v. Liberty Mutual Insurance Co., 367 U .S . 348 (1961) . Under Horton, even if a state agency may ultimately have authority to consider claims or aspects of those claims in the first instance, this Court may properly exercise diversity jurisdiction over state worker's compensation cases. Id. at 350, 352 .

Footnote

*Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Filed 2/15/2006
DOCKET NO. 04-2405

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA,
LAKE CHARLES DIVISION

LIBERTY MUTUAL INSURANCE COMPANY

VS.

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL

JUDGMENT

For the reasons set forth in the Memorandum Ruling of this date,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc. #79) filed by Liberty Mutual Insurance Co. is hereby GRANTED relieving Liberty Mutual of any obligation to pay defendants, Dr. Clark Gunderson and Lake Charles Memorial Hospital any additional sums.

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc. #70) filed by First Health Group, Inc., is hereby GRANTED IN PART, to the extent that First Health does not owe Liberty Mutual indemnity for underpayments sought by Defendants, Dr. Clark Grunderson and Lake Charles Memorial Hospital against Liberty Mutual, but DENIED IN PART to the extent First Health does owe indemnity to Liberty Mutual for attorney fees

incurred in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Liberty Mutual has 30 days from this date to submit documentation to support its claims for attorney fees against First Health and First Health is granted 20 days thereafter to respond, after which the Court will decide the appropriate amount of the award of attorney fees.

IT IS ORDERED, ADJUDGED AND DECREED that the motion to strike (doc. #73) filed by Dr. Clark Gunderson and Lake Charles Memorial Hospital is DENIED as MOOT.
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants, Gunderson and LCMH are to pay all costs of court.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 15th day of February, 2006.

JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

Filed: 1/4/2008
DOCKET NO. 04-2405

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA,
LAKE CHARLES DIVISION

LIBERTY MUTUAL INSURANCE COMPANY

VS.

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL

AMENDED JUDGMENT PERMANENT INJUNCTION AND STAY ORDER

IT IS ORDERED, ADJUDGED AND DECREED that the motions for civil contempt and sanctions and or permanent injunction and stay of proceedings pursuant to the All Writs Act (docs. #136 and 146) are hereby GRANTED IN PART and DENIED IN PART, The motions for civil contempt and sanctions are hereby DENIED; the motions for a permanent injunction and stay order are hereby GRANTED: pursuant to the All Writs Act, 28 U.S.C. § 1651(a), a permanent injunction and stay order is hereby ISSUED (1) enjoining Lake Charles Memorial Hospital ("LCMH") from pursuing any claims before any court or administrative agency in the State of Louisiana against Liberty Mutual Insurance Company and First Health Group Corp. and/or its payors which alleges that the Provider Agreements during the period from January 1, 2000 through November 30, 2004 between First Health and LCMH are invalid and/or unenforceable because they

run afoul of the Louisiana Workers' Compensation law, or, are null and void because LCMH was not provided with a benefit card as required by Louisiana Revised Statute 40:2203.1; and (2) enjoining Dr. Clark Gunderson from pursuing any claims before any court or administrative agency in the State of Louisiana against Liberty Mutual Insurance Company and First Health Group Corp. and/or its payors which alleges that the Provider Agreements, during the period from February 1, 2002 through June 1, 2006, and for participating patients, during the period from February 1, 2002 through July 30, 2006,[1] between First Health and Dr. Gunderson are invalid and/or unenforceable because they run afoul of the Louisiana Workers' Compensation law, or, are null and void because Dr. Gunderson was not provided with a benefit card as required by Louisiana Revised Statute 40:2203.1.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 4th day of January, 2008

JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

Footnote

1 Paragraph 5.2 of the agreement provides for a sixty (60) day post-termination run-off period for established patients. Exhibit K, p. 7, attached to the Motion for Civil Contempt and Sanctions and for Permanent Injunction and Stay of Proceedings Pursuant to the All Writs Act.

Filed 06/04/2008
DOCKET NO. 06-570
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA LAKE CHARLES DIVISION

SENTRY INSURANCE, MUTUAL COMPANY

v.

SOUTHWEST LOUISIANA HOSPITAL ASSOCIATION d/b/a LAKE CHARLES MEMORIAL HOSPITAL AND . DALE BERNAIJER, MD

MEMORANDUM RULING

Before the Court is "Defendants" Motion to Dismiss for Lack of Subject Matter Jurisdiction" (doc. #70) filed by Southwest Louisiana Hospital Association d/b/a Lake Charles Memorial Hospital ("LCMH") and R. Dale Bernauer, M.D. ("Dr. Bernauer") wherein the movers seek to dismiss the claims of plaintiff, Sentry Insurance, Mutual Company ("Sentry") against both LCMH and Dr. Bernauer because of lack of subject matter jurisdiction. Also before the Court is a "Motion to Enter Final Judgment'" wherein Sentry moves this Court to enter a final judgment pursuant Federal Rule of Civil Procedure 54(a) the Judgment rendered on September 5, 2007.[1]

FACTUAL STATEMENT

A recitation of the facts in this matter was stated in this Court's Memorandum Ruling[2] dated July 7, 2006 and will not be restated herein

LAW AND ANALYSIS

A motion for lack of subject matter can be raised at any time.[3] Defendants maintain that the claims asserted by Sentry should be dismissed because the amount its controversy as to each defendant does not meet the jurisdictional amount, and/or because the Louisiana Office of Workers' Compensation has original, exclusive jurisdiction over these claims and removal of such claims is prohibited by 28 U.S.C. § 1445(c). Defendants make the following argument: LCMH brought claims against Sentry in the Louisiana Workers Compensation Court ("OWC") seeking under payment and late payment of medical bills rendered to workers' compensation claimants, as well as penalties and attorney's fees provided by La. R.S. 23:1201 (F). These claims were filed prior to Sentry's initiation of the instant declaratory action. As an affirmative defense to the claims, Sentry asserted that it was entitled to access certain alleged PPO provider contracts between the providers and First Health. Defendants suggest that if Sentry obtains a favorable ruling in this matter, this Court will be asked to enjoin Defendant's OWC claims. Because Sentry's affirmative defense in the OWC case is the same issue in the instant matter, Sentry's declaratory action is effectively an attempt to remove those issues to Federal Court which is prohibited by 28 U. S. C. § 1445 (c).

In opposing the motion to dismiss, Sentry reminds the Court of its ruling in Liberty Mutual v. Dr. Clark Gunderson and Lake Charles Memorial Hospital,[4] wherein we held that the Federal Court had jurisdiction over the matter based on diversity of citizenship, citing Horton v. Liberty Mutual Ins. Co.[5]

and St. Paul Ins. Co. v. Trejo.[6] However, in the Liberty Mutual case, the plaintiff asserted breach of contract faints and alleged that Louisiana Revised Statute 40:2203.1(B) violated the Contract Clause of the United States Constitution. We expressly recognized the limited jurisdiction of the OWC with regards to these claims and held that we were not divested of jurisdiction based on Horton, supra and Trejo, supra. We also refused to abstain under the Younger doctrine based on that our finding that the OWC was not an adequate forum to hear the claims raised in Liberty Mutual's complaint - specifically, the contractual and constitutional claims.

In the instant natter, there are no claims for breach of contract or constitutional violations. Thus, we must conclude that to allow this Court to rule on the exact same issues currently pending before the OWC between the same parties would indeed be in violation of 28 U.S.C. § 1445(c) and would effectively be the same as allowing Sentry to remove the OWC lawsuit to Federal Court. However, this does not apply to Dr. Bernauer because he had no claims filed in the OWC prior to the instant declaratory action being filed.

Dr. Bernauer maintains that the claims Sentry has asserted against him should be dismissed because they do not meet the requisite $75,000.00 jurisdictional amount. Dr. Bemauer argues that the amount in controversy between Sentry and Dr. Bernauer as of the date of filing is considerably less than 575,000.00 because Dr. Bernauer has never filed any claims in the OWC against Sentry. Sentry maintains that the amounts that it has pled to its Complaint clearly exceeds $75,000.00. The test for jurisdictional amount in

a declarator action is the "total value of the right to be protected or the injury to be prevented,"[7] Sentry alleges in its Complaint that from February 2, 2003 through January 11, 2006, Dr. Bemauer submitted approximately 74 bills that were subject to a $6,600.00 discount pursuant to Dr. Bemauer's contract with First Health. Each claim is subeject to up to a $2,000.00 penalty plus attorney's fees pursuant to La. R.S. 23:1201(F)[8] Furthermore, Sentry could be subject to penalties of twice the billed charges ($ 51,022.00) or $ 50 per day, per claim pursuant to La. R.S. 40:2203. 1 et seq., under the Louisiana Any Willing Provider Act.[9] At $50 per day, the amount of penalty pursuant to La. R.S. 40:2203.1 per claim could be $18,250.00 per year.fn10 The Court finds that Sentry has sufficiently pled an amount in excess of $75,000.00. The Court further directs entry of a final judgment as to the Judgment rendered on September 5, 2007 to the extent that it pertains to Dr. Bernauer.

CONCLUSION

Based on the foregoing, thc motion to dismiss will bc granted in part and denied in part. The motion will be granted to the extent that Southwest Louisiana Hospital Association d/b/a Lake Charles Memorial Hospital will be dismissed for lack of jurisdiction; otherwise, the motion will be denied. The motion to enter final judgment will be granted in part and denied in part, the motion will be granted and the Court wilt direct entry of final judgment as to the Judgment rendered on September 5, 2007 to thc extent it pertains to Dr. Bernauer, otherwise the motion is denied.

THUS DONE AND SIGNED in Chambers at Lake

Charles, Louisiana, this 4th day of June, 2008,

Footnotes

1 Doc. #65.

2.Doc. #25.

3 Fed. R. Civ. P. 12

4 Civ. Action No. 04-2405

5 367 U.S., 348, 350-54 (1961).

6 39 F,3d 585, 588 (5th Cir. 1994).

7 Leininger v. Leininger,705 F. 2d 727, 729 (5th Cir. 1983).

8 Complaint, Par. 13

9 Id.

10 Id.